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No. 75-567 and No. 75-577 (Consolidated)
OCTOBER TERM, 1975

State of Oregon, Acting by and
through the State Land Board,
Petitioner and Respondent,
v.
Corvallis Sand and Gravel Company,
an Oregon corporation,
Respondent and Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF OF UTAH AND NEW MEXICO AS AMICI CURIAE

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I. PREFACE

A. *The Issue*

Near Corvallis, Oregon, the Willamette River separates into two channels for a short distance, and these two channels then join again to form a single channel. At an earlier time, the right-hand fork carried the primary flow of the stream, but the left-hand fork then be-

gan to carry a heavier flow, until, at present, the left-hand fork carries virtually the entire flow.

The Willamette River is navigable, and Oregon at statehood thus acquired title to the bed and shores up to the ordinary high water mark of the River. A private corporation, claiming riparian rights, has removed sand and gravel from the left-hand fork. The State of Oregon sought ejectment and damages.

The decision of the Oregon Supreme Court, 272 Or. 545, 536 P.2d 517 (1975), which was brought before this Court for review, addressed difficult concepts of real property law as they relate to riparian rights and the respective ownership claims of the parties to eleven separate parcels of submerged and adjacent lands.

Two basic questions are now before this Court: (1) are the ownership claims to be resolved by the law of Oregon or by federal decisional law; and (2) if by federal decisional law, what are the respective rights of the parties to the bed and shorelands of the Willamette River?

Utah and New Mexico, as the present *amici curiae*, are concerned only with the first question, and have confined this brief to that issue.

B. *Position of Utah and New Mexico*

Utah and New Mexico respectfully request the Court to declare that the present dispute must be con-

trolled and resolved by the law of Oregon, and not by federal decisional law. To the extent that *Hughes v. State of Washington*, 389 U.S. 290 (1967), and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), must be overruled, it is respectfully requested that they be overruled.

Hughes involved a "dry sand" area of the beach along the Pacific Ocean, which was claimed by the State of Washington as part of the tidelands which it received at statehood by virtue of the equal footing doctrine, and by Mrs. Hughes as a private upland owner by virtue of the riparian rights doctrine of accretion. The Washington Supreme Court held that state law controlled, and that under state law the boundary separating state-owned tidelands and privately-owned uplands became fixed and permanent at statehood, and that state-owned tidelands thus were not subject to divestment by the common law doctrine of accretion. This Court reversed, holding that a federal question was present by virtue of the fact that a predecessor-in-interest of Mrs. Hughes had obtained the land by patent from the United States, and that it was necessary to construe the effect of the patent to ascertain whether it carried with it any attributes of riparian rights. The Court held that it did, and that the riparian rights doctrine of accretion must be applied as a matter of federal decisional law to divest the State of Washington of its title to the disputed area of the beach.

Bonelli involved a tract of land near the Colorado River in Arizona, claimed by Arizona as a part of the bed of the River received at statehood by virtue of the

equal footing doctrine, and by a private upland owner under riparian theories of accretion and reliction. It was undisputed that the land had earlier been a part of the riverbed, but the regulated flow of the River which resulted from the subsequent construction of Hoover Dam and the impoundment of waters in Lake Mead, and the effect of a relatively recent re-channelization of the River, left the tract in question high and dry. The Arizona Supreme Court held that state law applied, and that under state rules of property law neither accretion nor reliction could apply to divest the State of its title. This Court reversed, holding that the title which States receive to the beds of navigable waters at statehood by virtue of the equal footing doctrine is a defeasible title, and that Arizona had been divested of its title by virtue of the federal common law doctrine of accretion as expressed in *Hughes*.

It will be noted that *Hughes* and *Bonelli* arrive at exactly the same result even though they employ entirely different reasons for applying federal decisional law to displace local rules of property law. *Hughes* found a federal question by construing the legal meaning and effect of a federal patent issued under authority of laws enacted by Congress; however, Bonelli relied not at all on the derivation of title theory, even though it could have done so. *Bonelli* simply defined the equal footing doctrine in such a way as to make state ownership of the beds and shores of navigable waters subject to divestment through common law doctrines of riparian rights as defined and invoked as a part of federal common (decisional) law.

Utah and New Mexico are firmly convinced that both *Hughes* and *Bonelli* are in direct and irreconcilable conflict with the position embraced by this Court and expressed in dozens of its decisions from the founding of the Republic until the *Hughes* decision in 1967. It is also believed that there are many valid reasons of law and public policy why *Hughes* and *Bonelli* must now be overruled, and no sound reasons why they should not.

In short, Utah and New Mexico believe that the law of Oregon should govern the merits of the ownership dispute, and consequently express no view as to how the merits should be decided.

C. *Differing Positions of Amici and Oregon*

Utah and New Mexico, as the present *amici curiae*, are in general sympathy with the State of Oregon and in general agreement with the State of California, *et al.*, *amici curiae*. However, there are important differences, and they must be noted.

1. *Oregon's Position Distinguished*

Oregon requests the Court to "modify" the *Bonelli* case, as explained at pp. 18-19 of Oregon's brief dated February, 1976, in No. 75-567:

> The clearest solution to the problem pointed out above would, in other than boundary cases, be to make the state's sovereignty and ownership of its navigable watercourses follow the river independent of the character of the changes in the

river as sudden or imperceptible. *See State v. R. E. Janes Gravel Co.*, 175 S.W.2d 739, 741-742 (Tex. Civ. App. 1943). To adopt such a rule, however, this Court would have to modify in part the *Bonelli* rule that the state's "title to the bed of a navigable river mechanically follows the river's *gradual* changes in course." *Bonelli, supra,* 414 U.S. at 318 (emphasis supplied). The modification would be that the public's title to the riverbed (in other than boundary situations between states) would, irrespective of whether a change in the river was gradual or sudden, mechanically follow the river in its various movements. The State of Oregon would deem this a very desirable result, because it would produce certainty in the law, would terminate the need for much litigation and would quiet title to navigable riverbeds in favor of the public interest. (Emphasis appears in Oregon's brief).

Perhaps such a rule of law would be workable for the State of Oregon, but, in the view of Utah and New Mexico, it would be extremely unwise and confusing if proclaimed by this Court as a rule of federal law. Actual currents and water levels do not represent legal boundaries. On tidal waters, the boundary is the average of the high tides (*Borax Consolidated Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935)), and on inland navigable waters the boundary is the ordinary high water mark (*Alabama v. Georgia,* 23 How. 505 (1859); and see 43 U.S.C. 1301(a)).

Thus, boundaries on inland navigable waters do not move or change with the changes in elevations, levels or flows of the watercourses. Those boundaries change only when, through gradual and imperceptible

processes, the watercourse assumes a new, different and permanent stage or range of fluctuations. In such an event, a new "ordinary high water mark" will form at the new stage, and the boundary of the watercourse changes accordingly. Under common law principles, as adopted and followed in many of the States, such boundary changes can result only from erosion (a washing away of the bank or shore), accretion (gradual deposits of sediments on the bank or shore until it is permanently above the ordinary high water level), or reliction (gradual lowering of the watercourse to expose part of the bed as permanently dry upland). There are no other forces or processes recognized by the common law of the States (nor in any federal decisions, for that matter), which can result in a change in the boundary of a navigable water.

It is also important to note that the ordinary high water mark is rarely at the water's edge. It is located at an elevation that will contain the watercourse during all of its fluctuations during the entire period of an average year. Thus, the area within the ordinary high water mark will consist of the submerged bed and the adjacent shorelands up to the ordinary high water mark, unless it should happen that the actual water level at a particular moment was precisely at the ordinary high water mark. (*Alabama v. Georgia, supra,* at pp. 513 *et seq.*). The high water mark ordinarily is found as a physical mark on the ground, sometimes evidenced by a vegetation line which indicates the high water level reached by the watercourse during a substantial period of the average year, and sometimes (particularly with respect to lakes) evidenced by a wave-action erosion

line at the highest level reached by the water for a substantial period of the average year.

The only point of present relevance is that rules of property have been developed and applied in every State to govern the location of boundaries of navigable waters. It would be confusing and disruptive in the extreme if the Court now were to announce a new rule which said that the actual current or level of the watercourse is the boundary. Utah and New Mexico do not propose any generally applicable rule, but, rather, urge the Court to announce no general rule, and to decide that the law of Oregon governs the dispute.[1] If the Court should do that, Oregon is free to apply its own local law, so long as no validly acquired, vested property rights are impaired or destroyed in the process, and other States would similarly apply their respective statutory or decisional rules.

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[1] Neither Utah nor New Mexico is involved in any litigation that will be affected by the Court's resolution of the case at bar, and this brief is prompted by no motive other than a firm conviction that **Hughes** and **Bonelli** can result in no good and inevitably must do much harm if not overruled. Utah is still involved in the continuing controversy with the United States over the ownership of certain shorelands surrounding the Great Salt Lake, pending in this Court as **Utah v. United States, No. 31, Original.** The final phase of that case, now held under advisement by Special Master Charles Fahy, involves only a determination of the original boundary of the Great Salt Lake at the date of Utah's statehood. Both parties have conceded that this is a federal question. It might be noted, however, that in an earlier phase of that litigation the Special Master ruled that as a matter of federal law the doctrine of reliction did not apply to exposed shorelands surrounding the Great Salt Lake because of the unique physical characteristics of the Lake. This Court accepted and approved that report, and entered a decree in accordance therewith, more than a year after the **Bonelli** decision. **Utah v. United States, 420 U.S. 304 (1975).**

2. *California's Position Distinguished*

California and twenty-two other States have filed an *amici curiae* brief in this case (No. 75-567 and No. 75-577 Consolidated). Utah and New Mexico declined to join therein, and elected, rather, to file this brief. In so doing, it is emphasized that Utah and New Mexico support the substance of the arguments advanced by California, *et al.* Two distinctions, however, are noteworthy.

We disagree with California's belief that the *Bonelli* decision casts a cloud on state ownership of the beds and shores of inland navigable waters located within the ordinary high water mark. This concern is expressed, for example, on page 2 of California's brief:

> If federal common law controls this dispute, California and its sister States are concerned that their once absolute ownership of the lands beneath their navigable waters and lakes and their tidewaters may be reduced to nothing more than a navigational servitude.

California was concerned with the Court's reliance in *Bonelli* on the fact that Arizona had no public interests associated with navigation or other public purposes that justified denial of *Bonelli's* accretion claim .However, it must be remembered that the Court was considering only whether Arizona's "defeasible" title should be divested by application of the doctrine of accretion. Thus, the Court's emphasis on public interests and navigational needs related solely to whether, as a matter of federal decisional law, the state's "defeasible" title

should be diminished by declaring the high-and-dry land to be accretion land.

Further, *Bonelli's* characterization of Arizona's title as "defeasible" was clearly limited to potential divestment by common law principles of riparian law. That is, in the discretion of this Court federal decisional law could be applied to divest state title to shorelands under doctrines of accretion, reliction and erosion—but under no other doctrines, because riparian law recognizes no other changes in boundary.

This Court intimated nothing in *Bonelli* which could cast any cloud over state ownership of submerged lands *and* shorelands *within the ordinary high water mark*. In fact, the very purpose for applying the accretion doctrine in the *Bonelli* case was to move the boundary from the upland side of the permanently dry tract in dispute to the ordinary high water mark. There was no suggestion that Arizona did not continue to own the submerged bed and that part of the shore located between the water's edge and the ordinary high water mark. The very nature, purpose and function of the doctrine of accretion is to adjust the upland owner's boundary so that it always remains at the ordinary high water mark.

Moreover, in light of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, it is impossible to believe that this Court has or will put in question the absolute ownership of the States in and to the beds and shores of inland navigable waters up to the line of ordinary high water. Accordingly, even if this Court should reaffirm

the *Bonelli* holding, Utah and New Mexico believe that it is clear that state title is "defeasible" only by operation of the doctrines of reliction and accretion. As such, state title is defeasible only to the extent that the area located within the high water mark at statehood changes so that a new and different area is embraced by a new ordinary high water mark. If the change results from the physical processes of accretion or reliction, the defeasible title of the State is divested to that extent. Of course, if the change results from the process of erosion the State gains additional land, because erosion divests uplands, not state-owned beds or shorelands.

Of course, if this Court elects to fashion generally applicable federal rules of property law in the case at bar to resolve ownership claims to the submerged bed and the shorelands within the ordinary high water mark, then California's fears would be very well founded. The pertinent point is that neither *Hughes* nor *Bonelli* can serve as any precedent for applying federal law to resolve title disputes to lands located below the ordinary high water mark or the line of the average high tides.

Having said that, it is still important to emphasize that *Hughes* and *Bonelli* are wholly unsound, and that there are many compelling reasons why they should be overruled.

The second difference of significance between California's position and that taken by Utah and New Mexico is that California urges the Court to overrule only *Bonelli*, and makes no mention of *Hughes*. We believe, on the other hand, that *Hughes* is fraught with fully as

much mischief as *Bonelli*, and that both cases must be overruled.

D. *Refinement of the Issue as Perceived in this Brief*

It is the thesis of this brief that the Court should decide that it has no jurisdiction for want of a substantial federal question; and that, in so holding, the Court should expressly overrule both *Hughes* and *Bonelli*.

The issue, then, is simply whether federal or state rules of property law should control questions of accretion, reliction, erosion and avulsion. Federal rules of decisional law, if *Hughes* and *Bonelli* are an accurate guide, probably will be patterned after common law principles of riparian rights as developed in England and modified to some degree in the Eastern States. If there were a general and uniform law of riparian rights, then presumably state law and federal law would reach essentially the same results.

But there is no uniform law of riparian rights. Many of the Western States have never adopted any legal concepts of riparian rights, while other States have adopted some riparian principles and rejected others. In particular, many States have held that their ownership of the beds and shores of inland navigable waters to the line of ordinary high water as it existed at the date of statehood involves a fixed and permanent boundary that cannot be modified or changed by the common law doctrines of accretion and reliction. This was the status of the local law, for example, in both *Hughes* and *Bonelli*.

The question, then, is not necessarily one of determining whether a State has correctly applied a particular riparian doctrine, but, rather, whether the State is free not to incorporate such a doctrine at all in its rules of property law. Of course, the States cannot change rules of property law and give them retroactive effect, so as to divest private rights validly acquired and vested under the earlier rules, but it is suggested that there is no sound reason why a State should not be permitted to decide for itself what its local rules of property law shall be.

Until *Hughes* and *Bonelli* are overruled, the States will be denied that fundamental sovereign right.

II. *SUMMARY OF ARGUMENT: REASONS WHY HUGHES AND BONELLI SHOULD BE OVERRULED*

A. *Hughes and Bonelli Represent a Departure from Prior Decisions*

From the founding of the Republic until 1967 this Court had held that federal grants and patents did not carry with them any attributes of riparian rights, and that rules of property concerning riparian rights were to be devised and applied by the respective States. In 1967 *Hughes* departed from the long and unbroken line of earlier decisions, and held that land titles derived from federal grants raise federal questions to the extent necessary to determine riparian rights under federal decisional law.

In 1973 *Bonelli* followed the *Hughes* departure in all practical respects, but selected a different theoretical justification for the result. *Bonelli* actually re-defined and diminished the measure of state's rights in the shores of navigable waters by devising a new and different interpretation of constitutional "equal footing" among the States. *Bonelli*, like *Hughes*, indicated that the issue is a matter of first impression, whereas in fact numerous earlier decisions of this Court had made clear that state title to the beds and shores of navigable waters is not defeasible. Thus, both *Hughes* and *Bonelli* were serious and substantial departures from prior precedent, but neither case indicated any such departure. And neither case expressly sought to discredit any of the numerous prior cases to the contrary.

B. *Hughes and Bonelli Presented No Federal Question*

No federal question for purposes of jurisdiction was presented in either *Hughes* or *Bonelli*. *Hughes* could have presented a federal question with respect to the meaning and effect of federal land grants to determine whether they carry any attributes of riparian rights, *if* that question had not already been laid to rest. But *Shively v. Bowlby*, 152 U.S. 1 (1894), clearly said that federal grants and patents carry no attributes of riparian rights. And this Court had consistently refused to recognize any federal question merely by virtue of the fact that one of the parties derived his title from a federal grant or patent. As this Court said in *Shulthis v. McDougal*, 225 U.S. 561 (1912), in denying jurisdiction for want of a substantial federal question:

> This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. (225 U.S. at 569).

Bonelli is similar in the sense that this Court had repeatedly held in its prior decisions that state title to the beds and shores of navigable waters was not defeasible. Numerous efforts were made by riparian owners to make inroads on such state ownership through claims based on reliction and accretion. This Court steadfastly said that the state's title was not defeasible by such claims unless the law of the State so provided. Thus, in *McGilvra v. Ross*, 215 U.S. 70 (1909), this Court said that the question of riparian rights had raised a federal question prior to *Shively v. Bowlby, supra*, but that the *Shively* decision had definitively answered that question by saying that riparian rights in navigable waters and their shores must be defined by the laws of the respective States. Since the federal question had been answered, said this Court, there was no longer a question which could give federal jurisdiction. See also *Iowa v. Rood*, 187 U.S. 87 (1902).

The Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, could have been the basis for a federal question in *Bonelli* if the claim of one of the parties had depended on the Court's construction of the statute:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not arise unless it

> really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912).

Even though Arizona based a claim on the Submerged Lands Act, that statute presents absolutely no basis for a determination that the States have a "defeasible" title to the beds and shores of their navigable waters. As noted below, the Submerged Lands Act had the opposite effect.

C. *Submerged Lands Act Confirmed and Established State Ownership*

Hughes paid no attention to the Submerged Lands Act, and *Bonelli* gave it short shrift. That Act expresses the clear congressional intent that the States have full and complete ownership of the beds of navigable waters and adjacent shorelands; Congress also expressly disclaimed any federal interest in favor of the States. That disclaimer included all natural resources in such lands and waters, and natural resources were defined to include, but were not to be limited to, all "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. 1301(e). *Bonelli* observed that the Submerged Lands Act did not convey anything to the States, although the United States Solicitor General made a persuasive argument to the contrary in 1972 (which apparently was accepted by this Court), as illustrated in Section IV of this brief.

D. *State Law Required by Submerged Lands Act*

It seems clear beyond doubt that the Submerged Land Act requires state law to control the present dispute (as well as the disputes before this Court in *Hughes* and *Bonelli*). Section 43 U.S.C. 1311(a) provides:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources *all in accordance with applicable State law* be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950 [the date of this Court's decisions in the *Louisiana* and *Texas* cases], entitled thereto *under the law of the respective States in which the land is located* . . . (Emphasis added).

With respect to the boundaries of inland navigable waters, Section 43 U.S.C. 1301(a) provides that such waters are defined to include:

> . . . all lands within the boundaries of each of the respective States which are covered by nontidal waters that were *navigable under the laws of the United States* at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, *up to ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction* . . . (Emphasis added).

Nothing could be clearer. Congress provided that "the laws of the United States" would apply to determine whether the waters were navigable at the time that a State was admitted into the Union, and this was consistent with all of the decisions of this Court since the federal test of navigability was first established in *The Daniel Ball*, 10 Wall. 557 (1870). If the waters were navigable under the federal test, then the congressional grant recognized, confirmed, established and vested in and assigned all ownership interests to the "respective States or the persons . . . entitled thereto under the law of the respective States in which the land is located . . ." And, further, Congress specifically identified the boundary as the ordinary high water mark as modified by accretion, erosion or reliction.

Every aspect of the Submerged Lands Act was entirely consistent with the decisions of this Court as of May 22, 1953, when the law took effect. This Court had always applied federal law to determine navigability for purposes of state title under the equal footing doctrine, and had always required that riparian claims concerning reliction, accretion and erosion be determined under the laws of the respective States. In *Hughes* and *Bonelli*, however, this Court switched positions, but, in so doing, failed to note that Congress had clearly provided that state law must determine all such ownership disputes *after* it is determined under federal law that the waters were navigable at statehood, and that title had thus vested in the State under the equal footing doctrine.

E. *State Law Required by Judiciary Act*

Hughes and *Bonelli* also failed to note that the Judiciary Act, 28 U.S.C. 1652, requires the application of state law:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, *shall be regarded as rules of decision in civil actions in the courts of the United States*, in all cases where they apply. (Emphasis added).

This language might seem to be too broad and general for specific application to conflicts over titles to the beds and shores of navigable waters, but, as will be seen, this Court has specifically held that the above statute, as a constitutional necessity, requires local law to govern all land title disputes.

F. *State Law Required as Constitutional Necessity*

In *Swift v. Tyson*, 16 Pet. 1 (1842), this Court mistakenly construed the original Judiciary Act (Act of Sept. 24, 1789) as requiring the application of local law only for titles to "things having a permanent locality, such as the rights and titles to real estate." In *Erie v. Tomkins*, 304 U.S. 64 (1938), this Court overruled *Swift*, saying that in applying the *Swift* doctrine the Court had "invaded rights which in our opinion are reserved by the Constitution to the several States." (304 U.S. at 79-80).

Even *Swift*, which this Court said in *Erie* was an unconstitutional invasion of rights reserved to the States, had acknowledged that local law must govern land title

disputes. Thus, if *Swift* represented an unconstitutional construction of the Judiciary Act even though it acknowledged the necessity of applying local law to resolve all real property disputes, it necessarily follows that *Hughes* and *Bonelli* are much more serious invasions of the rights reserved by the Constitution to the States.

While *Erie* has been refined, if not slightly eroded, by subsequent decisions of this Court, *Hughes* and *Bonelli* are the only decisions which require or allow the application of federal decisional law to land title disputes concerning the beds and shores of navigable waters. As recently as 1973 this Court observed that "Even when federal general common law was in its heyday, an exception was carved out for local laws of real property." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973).

If this Court is to permit *Hughes* and *Bonelli* to stand, then, at the very least, it would seem advisable to explain the strange and circuitous route which this Court has traveled from *Swift* to *Erie* to *Hughes* to *Bonelli*.

G. *Equal Footing Requires State Law*

Both *Hughes* and *Bonelli* violate the constitutional equality of the States under the equal footing doctrine. *Hughes* is based primarily on the theory that federal land grants and patents raise federal questions as to the measure and effect of riparian rights derived from the

original grant. The Original States and Texas (as a sovereign republic when admitted to the Union) would seem to be immune from the *Hughes* doctrine because land titles in those States did not derive from federal grants. Thus, if *Hughes* remains in force and effect, the Court is confronted with a dilemma. If, on the one hand, *Hughes* is confined to States where land titles derived from the United States, then the Original States and Texas enjoy a superior footing; but if, on the other hand, *Hughes* is applied to all of the States, then the Original States and Texas will suffer a substantial diminution and impairment of their rights in the beds and shores of their navigable waters.

And the latter result, surprising as it may be, would seem to be required under the rationale of *United States v. Texas*, 339 U.S. 707 (1950). In the *Texas* case this Court expressly recognized that Texas had owned the marginal seabed adjacent to its coast upon her admission to the Union, but held that Texas must be deemed to have surrendered and relinquished such ownership to the United States upon her admission to the Union. The Court did not suggest that Texas intended to surrender such ownership, but said that the result was a constitutional necessity to preserve equal footing among the States; otherwise, Texas would enjoy a higher status and superior footing since no other State owned any part of the marginal seabed.

It is important to emphasize that Texas' regulatory authority and police power jurisdiction were not at issue—the question was confined to proprietary rights. If the *Texas* rationale is correct, then federal decisional

law cannot divest States of title to beds and shorelands only where titles are derived from the United States; but, as a matter of constitutional equal footing, it will be necessary to expand federal decisional law to resolve similar conflicts in the Original States and Texas as well.

Bonelli presents a similar dilemma. There, the Court elected to diminish the rights of the States in the beds and shores of their navigable waters by re-defining the equal footing doctrine. In so doing, it was said that such state title is "defeasible" by the application of federal decisional law to recognize accretions along the Colorado River. But it was not made clear whether all States have such a defeasible title, or whether it is only those States that were subsequently admitted into the Union.

This is, indeed, a difficult dilemma. If *Bonelli* is to be confined to States admitted into the Union on an "equal footing" with the Original States, then any notion of "equal footing" is an absurdity. If, on the other hand, *Bonelli* is to be extended to the Original States, the absurdity increases, because this Court then would have to say that when the Thirteen Colonies successfully revolted against England and became free and independent nations, they received a "defeasible" title to the beds and shores of their navigable waters. This, of course, is preposterous.

Thus, however sliced, both *Hughes* and *Bonelli* make a mockery of the equal footing doctrine.

H. *State Law Required to Protect Vested Rights of States*

For a century prior to 1967, this Court held that state title to the beds and shores of navigable waters was not defeasible. Both *Hughes* and *Bonelli*, operating under separate theories, serve to overrule those cases and make titles defeasible that previously were not defeasible. Whatever the rationale, and despite the semantics employed, the obvious and inescapable result is that *vested* and *indefeasible* property rights of the States, which were recognized under the prior decisions of this Court, are now subject to divestment by the retroactive application of the *Hughes* and *Bonelli* decisions.

Concurring in the result of *Hughes*, Mr. Justice Stewart observed that such a course of action would be an unconstitutional deprivation of property rights if the Supreme Court of Washington did it to a private person. Even though a "State" might not be a person within the meaning of the due process clause of the Fifth Amendment, it is no less offensive for the property rights of the States to be taken by a retroactive judicial decision.

I. *State Law Required to Protect Vested Private Rights*

While the States have certain responsibilities to protect the public interest which arises from the public trust in navigable waters, States can and do lease, sell and otherwise dispose of parts of the beds and shores

of navigable waters when such disposition will serve a public purpose, or will not interfere with public needs and interests, or when, in general, the States decide that the public interest would be advanced by such disposition. California has reported that it has issued more than 472 tideland patents to private parties (Brief of California, *et al*, as *amici curiae*, at p. 5). Utah and New Mexico have similarly issued a substantial number of leases and patents to private persons. Since these private lessees and grantees can receive no better title than that conveyed by the State as grantor, it necessarily follows that both *Hughes* and *Bonelli* will serve, retroactively, to divest the titles that unquestionably were valid under the law (including the decisions of this Court) at the time those titles were acquired.

J. *State Law Required to Protect Public Interest and Public Trust*

Hughes and *Bonelli* do violence to the public trust and to public interests in navigable waters and shorelands. This is directly illustrated by the parties actually before the Court in *Hughes*, where the land involved was a "dry sand" area on the beach of the Pacific Ocean. No one denied that the State of Washington had earlier owned this land, but the wave-action had washed and deposited additional sand and raised the elevation to a level where the beach area in question no longer was covered by the average of the high tides. Thus, all that had happened was that the state's land had received a coat of additional sand. Mrs. Hughes claimed that this new coat of sand caused an "accretion"

which converted the public beach into her private beach, and this Court agreed, thereby depriving the State and the public of a valuable recreation area. Under Washington's local law, the State would have retained ownership and the beach would have remained a public asset, but this Court created a new federal decisional law of riparian rights to convert the public beach into a private beach, and, under any reasonable reading of this Court's earlier decisions, conferred a private windfall on Mrs. Hughes.

Other potential impacts on the public interest could be much more severe. California has pointed out that substantial portions of the business districts of San Francisco, Oakland, Long Beach, San Diego, San Raphael and Eureka have been built on land acquired from the State through tideland patents (Brief of California, *et al*, as *amici curiae*, at p. 5). Utah has issued shoreland leases and patents for a number of public developments, including boating, bathing, and recreational facilities on shorelands where such facilities will be open for public use. Utah has also conveyed a large tract of such shorelands to the United States for a Federal Migratory Waterfowl Refuge (one of the largest in the world), and has issued shoreland patents to the State Department of Highways for the construction of segments of Interstate Highway 15 and Interstate Highway 80.

Under either *Hughes* or *Bonelli*, it is conceivable that private upland owners will successfully assert riparian rights under newly-created federal decisional law to obtain title to metropolitan areas, public recreational

facilities, a federal migratory waterfowl refuge, segments of the national Interstate Highway System, and *ad infinitum*.

It is thus clear that *Hughes* and *Bonelli* threaten to do great mischief to the public interest. And it is difficult to perceive any counter-balancing public interests advanced by those cases. *Hughes*, as noted, converted a public beach to a private one, and *Bonelli* converted a state-owned parcel of land near the Colorado River to private grazing land.

K. *State Law Required to Avoid Clouds on Real Estate Titles*

Even where ownership interests validly acquired under state law prior to 1967 are not actually divested by *Hughes* or *Bonelli*, it is clear that serious clouds have been cast on all titles to shorelands adjacent to navigable waters. And, because of the implications of constitutional equal footing (discussed in Item G, above), these clouds necessarily extend to the Original States and Texas. The law favors stability and certainty in real estate titles, and stability and certainty were provided prior to 1967 by the laws of the respective States. That has now changed.

A well-respected title lawyer, expressing frustration with *Hughes* the year following its decision, wrote:

> For over forty years, title examiners have relied on a Utah Supreme Court decision which apparently had established authoritatively that the doctrine of accretion and reliction was not extant as to the beds of navigable waters in Utah. *Shearer, Federal Land Grants to the States: An Advocate's Dream; a Title Examiner's Nightmare*, 14 Rocky Mountain Mineral Law Institute, 193-94 (1968).

Title examiners will now be hard put to render definitive opinions on the status of titles to lands adjacent to navigable waters, lending institutions will be reluctant to fund developments, and general frustration and uncertainty will prevail.

L. *Federal Law Protects No Private Interests*

Hughes and *Bonelli* would not only have been justified, but would have been required as a constitutional necessity, if upland owners had had valid, vested riparian rights that had been taken by the States without due process of law. But that was not the case.

Under the law as it existed prior to 1967, no riparian rights existed unless, and to the extent that, such rights were created and recognized by local law. If any riparian rights can be said to exist today by virtue of federal law, those rights must have their origin either in the *Hughes* decision in 1967 or the *Bonelli* decision in 1973.

In short, *Hughes* and *Bonelli* did not serve to protect existing riparian rights—they laid the foundation for creating such rights where none had existed before under any federal statutory or decisional law.

M. *Federal Law Would be All-Pervasive*

It seems axiomatic that federal decisional law

under *Hughes* and *Bonelli* would have to be applied to disputes between private upland owners and private persons holding patents or leases to shorelands and tidelands derived from the States. This would be so because, as noted above, grantees and lessees of the States could receive no better title than that which had been held by the States at the time of the lease or conveyance.

Further, because of the implications of constitutional equal footing, it would seem that such disputes, subject to resolution by federal decisional law, would extend to each of the Fifty States. Thus, *Hughes* and *Bonelli*, if left intact, promise to be very pervasive doctrines.

N. *Federal Law Would Burden the Federal Judiciary*

This Court surely can take judicial notice of the work-load of the federal courts. If *Hughes* and *Bonelli* remain in effect, the federal courts will not only be called on to decide a never-ending series of disputes to shorelands and tidelands, but will be required, in the process, to develop a body of federal property law equal to the range of disputes that arise. The present case is merely a harbinger of things to come. It is assumed that, constitutional implications aside, this is a burden that would not be welcomed by the federal courts—unless such a task was necessary. And it is not.

O. *Bonelli's "Public Interest" Criteria Are Impractical*

If *Hughes* remains in effect, then it seems clear that whenever a party to a riparian dispute can trace his title to a federal grant, then his riparian rights will be determined by federal decisional law. *Bonelli* presents additional complications, because in that case this Court placed great emphasis on a consideration of "public interest" criteria to determine whether it was important for Arizona to own the land there in dispute. The Court concluded that there was not a sufficient public interest, and invoked a federal accretion doctrine to divest Arizona of title.

But how are these public interest criteria to be applied by the federal courts in future cases? Is the State required to prove, as part of a title adjudication, all of the public policies, programs, interests and possibilities relating to the land in dispute? And is the private riparian claimant to counter this evidence by presenting his plans, interests, hopes and expectations for the property? And is the court then to weigh the respective public and private interests to be affected by its decision, and, as a matter of judicial policy, decide who owns the land?

That approach does not sound much like an adjudication of land titles under rules of property law. It sounds more like a federal administrative officer examining an environmental impact statement under NEPA to decide whether, as a matter of policy, a proposed federal action should proceed.

P. *Federal Law Would Protect No Federal Interest*

It has already been noted that federal decisional law under *Hughes* and *Bonelli* protects no private rights, but merely creates them. It is now to be noted that federal decisional law protects no federal interest. Federal regulatory authority over navigation which arises under the Commerce Clause, and federal admiralty jurisdiction which arises under the Judiciary Clause, are clearly supreme federal powers that in no way are affected by the adjudication of land titles by the States. Federal regulatory authority over the navigable waters of the United States will follow the Willamette River, unaffected by Oregon's local law governing ownership rights in the bed and shorelands.

Federal property rights in water, such as the reserved water rights of the United States, have nothing to do with ownership rights in the shorelands. And, even when the United States is a direct claimant to the land is dispute, as it was in *United States v. Holt State Bank*, 270 U.S. 49 (1926), there is no reason why the local law should not control (as it indeed controlled in the *Holt* case).

Thus, there are no genuine federal interests to be protected or advanced by applying federal decisional law to riparian conflicts in the States. Neither *Hughes* nor *Bonelli* revealed any such genuine federal interest, although *Hughes* did note that the land there involved was adjacent to the Pacific Ocean and that the national interest in the international sea was substantial. This, however, was not a persuasive observation because

it is extremely difficult to see how any federal interest was advanced by converting the state-owned public beach into a private preserve for Mrs. Hughes. If that result advanced the federal interest in the international sea, the Court failed to explain why or how.

Q. *Federal Law is Inapplicable in Appropriation States*

Many Western States, including Utah and New Mexico, have never recognized the riparian rights doctrine and that regime has never been a part of their local law. Such rejection of riparian rights, even though land titles derived from the United States, was expressly approved by Congress in various statutes and was confirmed by this Court in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

Consequently, it is particularly inappropriate for the Court to announce at this late date (1967 and 1973) that riparian rights are an essential part of federal common law and must replace state rules of property law.

R. *States' Rights in Beds and Shores of Navigable Waters Do Not Derive from Federal "Grants"*

In *Bonelli* this Court seemed to suggest that Arizona received title to the bed of the Colorado River within that State as part of a federal grant under the equal footing doctrine at the date of Arizona's statehood. As such the Court proceeded to examine the nature, limits, and defeasible nature of the grant. But

it was an incorrect characterization to view the state's title as derived from a federal grant.

The States receive title to the beds and shores of navigable waters by virtue of constutional equal footing. Congress does not enact any statute to provide for such a grant. The Secretary of Interior does not issue any deed or patent.

Prior to the creation of a State, the Federal Government holds title to the beds and shores of navigable waters in trust for the future State when it is created, and upon its admission to the Union title automatically passes as a constitutional necessity in order to give the newly-created State the same measure of ownership and control over navigable waters as that held by the Original States (*Shively v. Bowlby*, 152 U.S. 1 (1894)). The only federal "grant" would be that provided by Congress in the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* (Of course, Congress has made a number of land "grants" to the States for public purposes, the most notable of which are the grants for educational purposes, as contained in the Enabling Acts of "public-land" States; and, when school land grants in place do not pass because of federal pre-emption or private entry prior to survey, other lands of equal acreage are granted as indemnification. See 43 U.S.C. 851 *et seq.*).

There is an anomaly to be noted. The ownership rights of the States in the beds and shores of navigable waters should occupy a superior status, and should receive vigilant and dedicated protection. It must be emphasized that States receive title to the beds and

shores of navigable waters as a *constitutional requisite* to preserve equal footing among the States. This constitutional equality involves not only ownership of such lands but sovereign regulatory authority over them, and a public trust is imposed on such waters and lands. This public trust does not derive from any federal source, and no federal question is involved. It derives as an integral aspect of equal footing so that the people within the newly-admitted State will enjoy the same rights as the people in the Thirteen Colonies at the conclusion of the American Revolution—and before the Federal Government was born.

The anomaly, then, is that even though state title is intertwined with sovereign regulatory rights and public trust responsibilities, and even though members of the public have a vital stake in public ownership of these lands, this Court has declared that private parties who hold common grants and patents under federal statutes have a title superior to that of the States. The States, this Court held in *Hughes* and said in *Bonelli*, have only a "defeasible" title which may be taken by private upland owners under rules of federal decisional law. The "riparian rules of property law," as fashioned by the Court, serve not only to convert public-trust land to private land, but also serve to extinguish public rights and the states' sovereign jurisdiction which, at statehood, was deemed to be a constitutionally protected property right.

And it was so considered by this Court from the birth of the Republic until 1967.

III. *NATURE OF STATES' RIGHTS IN THE BEDS AND SHORES OF INLAND NAVIGABLE WATERS BY VIRTUE OF THE EQUAL FOOTING DOCTRINE*

A. *Law of England*

Ownership of shores and banks, as well as submerged lands, developed in large part from the law in England as it pertained to the rights of the public, the Parliament, and the King in navigable waters, subjacent and adjacent lands. *Shively v. Bowlby* 152 U.S. 1 (1894). The ownership rights of the Crown and Parliament were both in a proprietary and a governmental capacity, but they were subject to certain public uses for navigation and fishing, and perhaps recreation. These public uses were deemed to be public rights in a limited sense and are often referred to in judicial decisions as a "public trust," which now imposes on States certain obligations to protect public interests in their navigable waters. *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In England the King could, in early times, make grants of the shores to private parties and extinguish public rights, but later statutes enacted by Parliament prevented this practice, so that only the Parliament had the power to diminish such public rights. *R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm*, at 106-08 (2d ed. 1875).

B. *The Original States*

As a result of the American Revolution, the Thirteen Colonies succeeded to all of the rights of both the English King and Parliament in and to navigable waters, their beds, and adjacent shores. When these colonies formed the Federal Union, and became the Original States, they did not surrender any of these ownership rights or proprietary interests to the United States, but did grant certain regulatory powers to the Federal Government. *U.S. Const., art. I, §8, para. 3; and art. III, §2, para. 1.*

The first case to deal with the specific question of state ownership of navigable waters and their beds did not arise until 1842, when this Court said that New Jersey, as one of the Original States, became, as a result of the Revolution, immediately and rightfully vested with all of the ownership rights, sovereignty and jurisdiction of navigable waters within its borders as had earlier been vested in the English Crown and Parliament. *Martin v. Waddell*, 16 Pet. 367 (1842).

Three years later this Court was required to consider whether subsequently-admitted States were entitled to the same sovereign and proprietary rights as the Original States. Alabama, the State involved, had not been an Original State, but had been created from federal territory. The Supreme Court said that, upon the admission of Alabama to the Union, as a matter of constitutional equal footing with the Original States, she was entitled to all of the navigable waters and the soils under them within the State, declaring:

> . . . to Alabama belong the navigable waters, the soils under them in controversy in this case, sub-

> ject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights. *Pollard v. Hagan*, 3 How. 212, 229 (1845).

This same declaration of equal sovereign and proprietary rights of all of the States to the navigable waters and underlying soils within their borders has consistently been applied by the Court in all subsequent cases where the issue arose. See, *e.g.*, *Barney v. Keokuk*, 94 U.S. 324 (1876); *U.S. v. Holt State Bank*, 270 U.S. 49 (1926); *United States v. Utah*, 283 U.S. 64 (1931); and *Utah v. United States*, 403 U.S. 9 (1971).

C. *Navigable Waters Defined*

In England the rights of the public, Crown and Parliament extended only to navigable waters. As an island, England did not have any significant waters susceptible of navigation that were not affected by the tides, and so the test of navigability in that country became whether the waters were affected by the ebb and flow of the tide, *The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443, 454-56 (1851). If so, the waters were navigable; if not, the waters were not navigable. If the waters were not navigable, there were no public rights of navigation or fishing. Lough Neagh is the largest inland lake in the United Kingdom, having a surface area of about 150 square miles, but there are no public rights to fish in that Lake, as is made clear by Lord McNaghten, speaking for the House of Lords:

> At the outset of his judgment, Ross, J., states two propositions of law. They are these: (1) The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. (2) No right can exist in the public to fish in the waters of an inland non-tidal lake. These propositions were accepted by the Court of Appeal. They were only faintly questioned at the Bar. Speaking for myself, I heard no argument tending in the slightest degree to shake their authority. I think that they are incontrovertible. I may add that in my opinion there can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea. In this country one and the same law applies to inland non-tidal waters whatever the size of the water space may be. *Johnson v. O'Neill*, 105 Law Times Rpt. 587, 597 (House of Lords, 1911).

The United States Supreme Court initially adopted the English test of navigability, holding that federal admiralty and maritime jurisdiction did not extend to the Missouri River because it was above the ebb and flow of the tide. *The Thomas Jefferson*, 10 Wheat. 428 (1825). However, in 1851 this Court rejected the tidal test as unsuitable for the United States, and held that all waters, navigable in fact and constituting a link in interstate or foreign commerce, whether or not affected by tides, were within the admiralty and maritime jurisdiction of federal courts. *The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443 (1851).

While it was thus clear that tidal effect *was not* the test of navigability, what *was* the test was less certain. Clarification came in 1870, when this Court de-

cided that the federal power to regulate commerce (licensing vessels on the river) extended to a relatively small inland river. The Court said:

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of water. There, no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different.
>
> Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

The language of the Court quoted above related to the exercise of the federal power to regulate commerce in navigable waters, and not to property ownership. But in *Barney v. Keokuk*, 94 U.S. 324 (1876), this Court

made it clear that the same test was to apply to determine ownership of shorelands. The question was whether such land was owned by the owner of the adjacent upland. Under English law, the owner of the upland would own the disputed tract; if the test of navigability as applied in *The Daniel Ball* were to be followed, the State of Iowa would own it. The Court held the Mississippi River to be navigable and found ownership to be in the State of Iowa:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad difference existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections . . . And since this court . . . has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It

> properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. 94 U.S. at 338.

All waters, then, that are reasonably capable of supporting commercial water craft, in the manner and mode customary at the date of a State's admission to the Union, are deemed navigable waters, and the beds and shores are owned by the States. *United States v. Utah*, 283 U.S. 64 (1931). This is true whether the water is navigable in interstate commerce or only in intrastate commerce. *United States v. Utah, supra.* Federal jurisdiction over admiralty and maritime matters, and the federal power to regulate navigation, extends only to those waters that are navigable in interstate or foreign commerce. *The Robert W. Parsons*, 191 U.S. 17 (1903) (admiralty); *The Montello*, 20 Wall. 430 (1874) (navigation). But these federal jurisdictional and regulatory powers have nothing to do with the ownership rights of the States, except that state ownership is subject to the exercise by the Federal Government of superior jurisdictional and regulatory powers.

D. *Non-Navigable Waters*

Historically, public rights attached to navigable waters because of the public need to use such waters. Since the basic public use was navigation, it was assumed that waters not susceptible to navigation were not required for public use. As a consequence, there

were no public rights in non-navigable waters, their beds, or banks. *Shively v. Bowlby* and *Johnson v. O'Neill*, both *supra.* The bed and banks were owned by the adjacent landowners, ordinarily called riparian owners because they owned land adjacent to or riparian to water in a natural lake or stream. *Wiel, Water Rights in the Western States*, vol. 1, 832 et seq. (3d ed. 1911). Riparian owners also had certain rights in the watercourse, at least in the Eastern States, to the extent that the water adjacent to their land could not, by the acts of others, be unreasonably diminished in quantity or quality. *Shively v. Bowlby, supra.*

E. *State Ownership as Integral Part of Public Trust*

It is important to emphasize that the States have a general police power to regulate certain conduct on private property and to regulate, to some extent, the use of private property. Thus, even though the beds and banks of non-navigable watercourses are privately owned, the States can prosecute crimes committed thereon, abate nuisances, promulgate reasonable zoning ordinances, etc. But it is equally important to emphasize that police power authority serves as no basis for declaring public rights of use on private property. For example, it is clear that a privately-owned farm will not be subject to *public use* for pheasant hunting, against the wishes of the owner, through any police power regulation by the State, even though, if hunting is conducted thereon, state regulations will control as to seasons, licensing and bag limits. Public rights might be acquired through purchase or eminent domain, with just

compensation paid to the owner, but public *regulatory power* cannot be converted into a *public proprietary right*. Thus, it is clear that private rights to the shores, beds and banks of non-navigable waters cannot be encumbered or diminished by state regulation to create rights of use in the public. This is why state ownership of the beds and shorelands of inland navigable waters is of extreme importance to protect public rights of use.

Public rights of use depend upon (1) public rights in the watercourse and (2) state governmental power to regulate and protect such existing rights. This Court has said as much:

> The State holds the propriety of this soil for the conservation of the public rights of fishing thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. . . . *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve those public uses for which the soil is held.* *Smith v. Maryland*, 18 How. 71, 75 (1855) (Emphasis added).

IV. *NATURE OF STATES' RIGHTS IN THE BEDS AND SHORES OF INLAND NAVIGABLE WATERS BY VIRTUE OF THE SUBMERGED LANDS ACT*

A. *Preface*

Congress confirmed in the States title to the beds and shores of all inland navigable waters, including all natural resources in such lands and all resources in such

waters, by virtue of the Submerged Lands Act, Act of May 22, 1953, c. 65, 67 Stat. 29, now codified as 43 U.S.C. 1301 *et seq.*

The Submerged Lands Act resulted from decisions of this Court which had held that coastal States did not own the marginal seabed adjacent to their shores. In order to obtain the support of the inland States, and thus gain sufficient congressional support to enact legislation which would grant a three-mile strip of the marginal seabed to the coastal States, those States included provisions in the bill which would confirm in the inland States title to the beds and shores of inland navigable waters.

The judicial and legislative history of the Submerged Lands Act is particularly significant because it demonstrates that this Court and the Congress have always attached extreme importance to state ownership of the beds and shores of inland navigable waters, as well as to the resources within such lands and waters.

This Court suggested in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), that the Submerged Lands Act did not serve to convey any federal interest to the States with respect to inland navigable waters. That observation might not be justified. While it is true that the States have always owned the beds and shorelands of their inland navigable waters, circumstances might arise where the Submerged Lands Act would serve to grant property interests in such waters to the States.

In fact, the United States Solicitor General re-

cently took such a position. In *Utah v. United States*, 403 U.S. 9 (1971), an issue arose as to the ownership of minerals contained within the waters of the Great Salt Lake. The Solicitor General thought that there might have been some question as to state ownership of minerals in solution by virtue of the equal footing doctrine, but thought that the Submerged Lands Act had removed any doubt. In his memorandum filed with this Court in April, 1972, the Solicitor General observed at pp. 7-9:

> The authorities are inconclusive concerning the general federal law on the question here — whether despite the Lake's navigability, the United States still owned any of the minerals in the bed of the Lake or in its brines. . . . As between the parties here—the United States and Utah—the federal rights, as defined by federal law, ordinarily would be paramount. It is plausible that under federal law not only the water, but also the minerals in it would be subject to exclusive federal control. . . .
>
> These questions apparently need not be resolved in this case, however, because of the Submerged Lands Act of 1953. . . . By that statute the federal government, with certain exceptions not pertinent here, "released and relinquished" to the respective states "all right, title, and interest of the United States" with respect to all "lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters. . . . "Natural resources" are defined as "includ[ing], without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life . . ." Thus the Submerged Lands Act explicity vested in Utah the bed of the Lake and all natural resources in the bed or in its waters which by definition include "oil, gas, and all other minerals." The congressional hearings and debates seem to indicate that the Act conferred on the State ownership of minerals dissolved in the waters as well as situated in the bed. . . . Although we can present no substantial argument to refute Utah's claim that under the Submerged Lands Act it, rather than the United States, owned the minerals in question prior to the conveyance, we think that the issue should be decided by this Court.

The issue was decided by this Court, and all such minerals were adjudicated and decreed to be owned by the State of Utah. *Utah v. United States*, 406 U.S. 484 (1972).

Further, the legislative history of the Submerged Lands Act identifies with particularity the exact acreage of beds and shorelands in inland navigable waters that was to be released, relinquished and confirmed in the States. While the Act requires as a condition to such confirmation that the waters be navigable under the federal test of navigability, this specific identification of lands by Congress creates a presumption that the overlying waters are navigable. See, *e.g.*, ***Water Policies for the Future***, Final Report of the National Water Commission, at p. 275 (1973); and ***Public Access Rights in Waters and Shorelands***, National Water Commission Publication PB-205-247, pp. 17 *et seq.* (July 1, 1971).

The two most significant aspects of the Submerged Lands Act, so far as present purposes are concerned,

are that Congress (1) attached extreme importance to state ownership of the beds of navigable waters, and specifically released and relinquished to the States all federal proprietary interest that otherwise might have existed in the beds and shores of inland navigable waters and in all natural resources, whether fauna, flora or mineral, within such waters or lands; and (2) declared that state law should control such questions as accretion, reliction, erosion and avulsion. Therefore, a careful review of the judicial and legislative background of the Submerged Lands Act is well worthwhile.

B. *Judicial History of Submerged Lands Act*

The Submerged Lands Act was passed in response to decisions issued by this Court in what popularly are referred to as the submerged lands cases: *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); and *United States v. Texas*, 339 U.S. 707 (1950). (For a recent decision following the rationale of those cases, see *United States v. Maine*, 420 U.S. 515 (1975)). All three cases involved the question whether the States owned the bed of the marginal sea (the seabed located below the tidelands). So far as relevant here, the *California* case (the first to be decided) represented a claim by the State that, since the:

> . . . original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an "equal

> footing" with the original states, California at that time became vested with title to all such lands. (322 U.S. at 23).

The Court rejected California's argument, pointing out that the Original States had not claimed any part of the bed of the marginal sea, but only the beds of navigable waters located within the boundaries of the States (these waters were termed "inland waters" and included tidelands as well as navigable waters not affected by the tides). Since the Original States did not claim or assert dominion over the bed of the marginal sea, the Court reasoned that California could claim no such ownership under the equal footing doctrine. The Court went on to point out that it was the Federal Government, after the Union was formed, that first staked out a claim to the marginal sea and exercised dominion over it, and further justified its holding by detailing the national interests that were critically involved in the marginal sea around the nation's coastline.

The *Louisiana* case, decided three years later, involved a similar claim by the State of Louisiana, and the Court rejected the arguments of the State, viewing its decision in the *California* case as dispositive of the question.

But the *Texas* case, decided at the same time as the *Louisiana* case, presented a somewhat different problem. Texas, as a Republic prior to statehood, had owned, both in a sovereign and proprietary capacity, the bed of the marginal sea in the Gulf of Mexico (at least to the extent of three statute miles from the shore).

Thus, Texas did not claim title by virtue of the equal footing doctrine, but by prior ownership and possession, asserting that, after statehood, such ownership was subject only to the regulatory and jurisdictional powers conferred on the United States by the Constitution. It was the Government who invoked the equal footing doctrine in the *Texas* case, pointing out that if Texas owned such seabed, it would be in a better position than the other States who did not own the seabed. The Court adopted the argument of the Government, holding that the equal footing doctrine cut both ways, and declaring that Texas could not have an ownership interest in the bed of the marginal sea when the other States had no such ownership:

> The "equal footing" clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she became a sister State on an "equal footing" with all other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the

> transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States. (339 U.S. at 717-18).

The submerged lands cases are history in the sense that Congress responded by passing the Act of May 22, 1953 (67 Stat. 29, 43 U.S.C. 1301 *et seq.*), vesting the coastal States with title to the bed of the marginal sea (three geographical miles distant from the coastline of each such State). But the submerged lands cases were fully consistent with the prior decisions of this Court relating to state ownership of the beds and shores of inland navigable waters, including tidelands. The Court simply pointed out that the Original States had never owned any part of the seabed, and as a matter of constitutional equal footing, no State could claim such seabed; and, indeed, in the case of Texas, it was necessary to take away such ownership in order to preserve constitutional equal footing.

It can easily be shown that the submerged lands cases, in discussing the reasons why the States did not own the bed of the marginal sea, did reaffirm state ownership of tidelands and inland navigable waters. In the *Texas* case, this Court cited *United States v. Oregon*, 295 U.S. 1 (1934), as a good summary of the basis for state title to the beds of inland navigable waters (339 U.S. at 716-17).

And in the *California* case the Court explained that one justification for state title to the beds of inland navigable waters was that local and state interests were there involved, and that a corresponding justification

for national control of the marginal seabed was that national interests were involved. Thus:

> If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying seaward in the three-mile belt. (332 U.S. at 36).

Or, again, as it was the belief that national interests compelled national rights in the sea bed, so it was the:

> . . . belief that local interests are so predominant as *constitutionally to require state dominion over lands under its land-locked navigable waters* . . . . (332 U.S. at 34) (Emphasis added).

With this series of cases decided, Congress passed the Submerged Lands Act, vesting title in the coastal States to the bed of a three-mile belt of the marginal sea, and confirming the already-existing title in the States to the beds of inland navigable waters. The legislative history of that Act will now be examined.

C. *Legislative History of Submerged Lands Act*

Congressional debate over submerged lands legislation endured over an eight-year period, during which three bills were passed by Congress. The first two were vetoed by President Truman and the third became law on May 22, 1953. All three bills purported to confirm in the States title to all inland navigable waters and the resources therein.

The proponents of the legislation (active support from 45 of the then 48 States) argued that the submerged lands cases had cast a cloud upon state ownership of the beds and shores of inland navigable waters, and that federal legislation confirming state title was necessary to remove the cloud.

On the other hand, the opponents of the legislation (including President Truman and the Administration) argued that it was unnecessary to confirm state title to inland waters and the resources therein because such state title had always been recognized and never questioned. Such a course of action, it was said, was simply a devious maneuver by coastal States to marshall support in Congress to obtain ownership of the three-mile belt of the bed of the marginal sea.

The primary purpose of the Act, of course, was to convey to the coastal States a three-mile belt of the marginal seabed and the resources therein—and the Act accomplished that purpose. But the point of present relevance has to do with state ownership of the beds and shores of navigable waters, and it will be seen that Congress clearly and expressly confirmed in the States title to an "absolute minimum" of 84,585,600 acres of land. Of this total, 17,029,120 acres were land within the three-mile belt of the marginal seabed, 38,595,840 acres were lands underlying the Great Lakes, and the remaining 28,960,640 acres were lands underlying other inland navigable waters.

During the 1930's and 1940's, considerable interest developed in the bed of the marginal sea as a source of

petroleum, particularly off the California coast. The State of California issued a number of oil and gas leases within a three-mile belt of the marginal sea along the California coastline, assuming that such seabed and natural resources therein were state-owned. The Federal Government became very much interested in the potential oil reserves in the bed of the marginal sea and began to examine the possibility of federal ownership of such seabed.

On May 29, 1945, the United States Attorney General, at the request of President Truman, filed suit against the State of California to determine whether the United States or California owned the bed of the marginal sea within the three-mile belt.

Needless to say, the coastal States immediately became concerned when the United States began to question state ownership of the three-mile belt of the marginal seabed. While the *California* case was still in litigation, and prior to its decision, the coastal States generated a good deal of activity in Congress to resolve any ownership questions in favor of the States. In order to marshall sufficient support in Congress to resolve such questions in favor of the States, it was suggested that state ownership of the beds of navigable waters was in jeopardy, and that state title should be confirmed to inland waters and tidelands as well as the bed of the marginal sea. This would have been the effect of House Joint Resolution 225 (79th Cong., 2d Sess., 1946), but it was vetoed by President Truman on August 1, 1946. In his veto message, the President pointed out that the *California* case had been filed at his direction, and that

he considered the Supreme Court, rather than the Congress, to be the proper forum for determining state versus federal rights in the seabed. Moreover, the President pointed out that tidelands and inland waters would in no way be threatened, and that the Government had been willing, during the congressional debate on the measure, to give an outright disclaimer of any federal ownership as to the beds of such waters, but that Congress had rejected such an offer:

> The Supreme Court's decision in the pending case [*United States v. California*] will determine rights in land lying beyond ordinary low-water mark along the coast extending seaward for a distance of 3 miles. Contrary to widespread misunderstanding, the case does not involve any tidelands, which are lands covered and uncovered by the daily ebb and flow of the tides; nor does it involve any lands under bays, harbors, ports, lakes, rivers, or other inland waters. Consequently the case does not constitute any threat to or cloud upon the titles of the several States to such lands, or the improvements thereon. When the joint resolution was being debated in the Senate, an amendment was offered which would have resulted in giving an outright acquittance to the respective States of all tidelands and all lands, under bays, harbors, ports, lakes, rivers, and other inland waters. Proponents of the present measure, however, defeated this amendment. This clearly emphasized that the primary purpose of the legislation was to give to the States and their lessees any right, title, or interest of the United States in the lands and minerals under the waters within the 3-mile limit. (H. Doc. No. 765, 79th Cong., 2d Sess.) (See Senate Report No. 133, Part 2, p. 113, 83rd Cong., 1st Sess.)

As a result of the presidential veto, congressional activity did not abate on the submerged lands question, but continued to flourish, with vigorous proponents and opponents both for state ownership and federal ownership. Then, after the Supreme Court had decided the *California, Louisiana* and *Texas* cases, all *supra,* Congress again sought to vest and confirm state ownership, not only to the three-mile belt of the marginal sea, but also to tidelands and inland waters. This congressional declaration came in 1952, as Senate Joint Resolution 20, but was also vetoed by President Truman on May 29, 1952. In this veto message the President said that he considered the Joint Resolution to be an unjustified gift of submerged lands to a few coastal States, at the expense of the nation as a whole, because the inland States were getting nothing but deception in the confirmation of title to the beds of inland waters. This was so, thought the President, because the States already owned such lands:

> It has been claimed that such legislation as this is necessary to protect the rights of all the States in the lands beneath their navigable inland waters. It has been argued that the decisions of the Supreme Court in the California, Louisiana, and Texas cases have somehow cast doubt on the status of lands under these inland waters. There is no truth in this at all. Nothing in these cases raises the slightest question about the ownership of lands beneath inland waters. *A long and unbroken line of Supreme Court decisions, extending back for more than 100 years, holds unequivocally that the States or their grantees own the lands beneath the navigable inland waters within the State boundaries.* (Emphasis added).
>
> . . .

> If the Congress wishes to enact legislation confirming the ownership of what is already theirs —that is, the lands and resources under navigable inland waters and the tidelands—I shall, of course, be glad to approve it. But such legislation is completely unnecessary, and bears no relation whatever to the question of what should be done with lands which the States do not now own—that is, the lands under the open sea. (See Senate Report No. 133, Part 2, p. 135, 83rd Cong. 1st Sess.)

The controversy continued as to whether the submerged lands cases had cast any cloud upon state ownership of tidelands and the beds of inland waters. In support of the Submerged Lands Act, the National Association of State Attorneys General prepared a memorandum brief for Congress, which was placed in the Congressional Record, and which suggested that the Supreme Court decisions in the submerged lands cases could be read as portending only a qualified state ownership of tidelands and inland waters to protect the trust of public use; but which contended that such ownership had always been both in a proprietary and sovereign capacity, subject only to superior federal powers granted by the Constitution:

> In English and American jurisprudence two separate and distinct sovereign rights have always been recognized with relation to navigable waters and the soils beneath them. These rights are: (1) proprietorship (jus privatum or dominium), and (2) governmental control for public use (jus publicum or imperium). Proprietorship (jus privatum—using, leasing, collecting revenues) must not and cannot interfere with the regulatory control (jus publicum) because the latter has al-

ways been paramount for the protection of the public uses of commerce, navigation, and fishing. In England both ownership and regulatory control (jus privatum and jus publicum) were vested in the King. Under our constitutional system in the United States the sovereign right of ownership (jus privatum) is vested in the respective States. The sovereign right of governmental control (jus publicum) is divided between the dual State and Federal sovereignties, with the States reserving all of such rights which were not delegated to the Federal Government. Under such a division of sovereign rights, State ownership of lands beneath navigable waters has not in the past and will not in the future interfere with that portion of the jus publicum contained in the paramount constitutional powers of the Federal Government for regulation and control of navigation, national defense, and other Federal powers. (1953 U.S. Code Cong. and Adm. News, p. 1531).

United States Solicitor General Philip B. Perlman responded to the contentions of the States Attorneys General, contending that as to tidelands and inland waters, there never had been and was not any question as to complete state ownership, and challenged the good faith of the States Attorneys General in even raising such an argument:

> . . . the Attorneys General's pamphlet purports to prove that the decisions by the Supreme Court as to the status of the submerged lands of the marginal sea involve the title to the submerged lands of the rivers, harbors, bays, lakes, and other inland waters of the States.
>
> This is not true and never has been true. Those in charge of the quit-claim legislation know it.

> Part of the effort to legitimize the trespass on Federal areas by 3 States at the expense of the other 45 States is directed to concealing the true status of submerged lands of inland waters, and to block legislation proposed by the Government to dispose permanently of baseless and frivolous contentions in which the entire pamphlet is framed. (1953 U.S. Code Cong. and Adm. News, p. 1618).

The States Attorneys General had said, referring among other things, to state ownership of submerged lands, that "This long-recognized rule of law, applicable to the waters and submerged lands of every State, has been destroyed and state titles clouded by the Supreme Court's 'tidelands' decision." Solicitor General Perlman responded:

> It is difficult to deal patiently with this series of misstatements. In the first place it should be noted that the word "tidelands" is a misnomer; the United States does not claim any rights, by reason of national sovereignty, in the soil of lands covered by the tides, and its rights begin at the low-water mark outside of tidelands, and seaward of inland waters, such as rivers, bays, etc., which empty into or are arms of the ocean.
>
> There is absolutely nothing, absolutely nothing, in the decisions by the Supreme Court in the California case or in the Louisiana and Texas cases (citations omitted) which destroys or impairs or affects in any degree any long-recognized rule of law, applicable to the inland waters and submerged lands under inland waters of any State. The Supreme Court in the California case, may fairly be said to have confirmed State rights in lands under inland navigable waters such as rivers, harbors, and even tidelands down to the

low-water mark." (1953 U.S. Code Cong. and Adm. News, p. 1621).

and, further:

> State ownership of submerged lands under inland waters has not been affected by the rejection of State claims to the resources of the submerged lands of the marginal sea, and, as has been shown, beyond even the marginal sea. But in order to take away from quitclaim proponents the opportunity to continue to present such a baseless contention, the appropriate Federal agencies prepared and submitted to Congress a bill releasing and relinquishing to the States, and to all others lawfully entitled, all right, title, and interest of the United States, if any it has, in and to all lands beneath navigable inland waters within the boundaries of the respective States. (1953 U.S. Code Cong. and Adm. News, p. 1623).

The final version of the Submerged Lands Act, identified as Senate Joint Resolution 13 and H.R. 4198 (83rd Cong., 1st Sess.), persisted in including a confirmation of state title for tidelands and inland waters, as well as the marginal sea. The Senate Committee Report explained:

> The joint resolution treats all of the States alike, both inland and coastal, with respect to lands beneath navigable waters within their respective boundaries. As shown by the list in appendix F, every State has submerged lands which are covered by this joint resolution. Comparative totals show far greater areas under inland waters and the Great Lakes, as follows:

	Acres
Lands under inland waters	28,960,640
Lands under Great Lakes	38,595,840
Lands under marginal seas	17,029,120

> All of these areas of submerged lands have been treated alike in this legislation because they have been possessed, used, and claimed by the States under the same rule of law, to wit: That the States own all lands beneath navigable waters within their respective boundaries. (Senate Report No. 133, March 27, 1953 [to accompany S.J. 13], 83rd Cong., 1st Sess., at p. 7).

The lands under the Great Lakes and the belt of land under the marginal sea are not difficult to identify, but the 28,960,640 acres of land under inland waters require further identification. Part of that identification was provided in Appendix F to the Senate Report, which contained a table that listed the exact acreage in each State of lands underlying (1) inland waters, (2) Great Lakes, and (3) the marginal sea.

The same tabulation of acreage for lands beneath inland waters as used by the Senate Report in its Appendix F had earlier been included in the brief of the States Attorneys General which had been placed in the Congressional Record, along with a statement to the effect that such submerged lands contained valuable minerals which produced revenues to support education and other functions of state government, and along with a specific identification of a broad range of mineral resources within and beneath the navigable waters of each State. Oregon, for example, was listed as hav-

ing valuable resources of sand, gravel, oil, gas and kelp. See Cong. Rec., July 24, 1951—Senate, Vol. 97, Part 7, 82nd Cong., 1st Sess., p. 8720.

Solicitor General Perlman had responded:

> This statement [that states were deriving revenues from natural resources within inland waters], standing alone, is undoubtedly true. What is false about it—and the publication with it of lists of the acreages of lands under inland waters, the Great Lakes and the marginal sea; and of the known resources of the waters and the submerged lands of such waters—is the treatment of the facts as if such waters and their submerged lands and resources have been held to be subject to the paramount power and full dominion of the United States. No more complete misrepresentation has ever been made to the Members of Congress of the United States. In this way, and only in this way, could the proponents of the Walter bill dare print a list of every one of the 48 States with the acreages and resources of submerged lands of inland waters, in an attempt to persuade the elected representatives of all the States, that, unless the Walter bill is enacted, they may be deprived of valuable resources belonging to their people. (1953 U.S. Code Cong. and Adm. News, p. 1619).

The Minority Views of those opposing the Submerged Lands Act were published as part of House Report 215 (To accompany H.R. 4198) and as Part II of Senate Report No. 133 (To accompany S. J. Res. 13) (both reports dated March 27, 1953, 83rd Cong., 1st Sess.), wherein a considerable space was devoted to detailing what the Minority Members thought was clear evidence that state ownership of inland navigable waters

had never been challenged by the Federal Government, but in fact had been explicitly and repeatedly recognized. (See, for example, 1953 U.S. Code Cong. and Adm. News, pp. 1440, 1468-69, 1550-55, 1617-40)

As note 1 to Appendix F of the Senate Report explained, the tabulation for lands under inland waters was taken from a Government publication entitled Areas of the United States, 1940, and published in connection with the 16th Census of the United States. That note explains that the acreage figures "are very approximate but are absolute minimums."

A reference to the U.S. Census publication cited shows that there the figures are expressed in square miles, rather than acres, although the figures correspond when converted from square miles to acres. As will be seen, the "approximate" nature of the figures might have resulted from the fact that the basic table for States in the Census report rounded acreage amounts to the nearest square mile, and thus dealt in no units smaller than 640 acres. However, supplementary tables in the Census publication do show a breakdown of lands under inland waters for each county in each State, for each voting precinct in each State, and for all incorporated areas having a population of 1,000 or more persons. Thus, it is possible to locate the exact number of square miles (in these tables the areas is broken down to the nearest one-tenth of a square mile) of inland waters in each voting precinct or minor political subdivision in the entire United States.

This can be demonstrated very easily. The publica-

tion cited, quoted from and relied on by Congress is, as noted, "Areas of the United States, 1940," and was published as part of the 16th Census of the United States by the Government Printing Office in 1942. At page 6 of that publication there appears a table of inland waters for each State. The area is expressed in square miles, rather than acres.

But the figures expressed in square miles correspond exactly to the Senate Report where the figures were expressed in acres. For example, that table lists Oregon as having 631 square miles of land underlying inland waters, which, when multiplied by 640 to convert to acres, exactly equals the 403,840 acres which the Senate Committee Report said were to be confirmed in Oregon. The same publication contains supplementary tables which further identify the lands underlying navigable waters covered by the Submerged Lands Act, as noted below.

The same Census Bureau publication, at pp. 6 through 17, lists the exact acreage of lands underlying inland navigable waters for each county within each of the then forty-eight States. A further and more detailed breakdown of those figures is found at pp. 18 through 304, where the tables are entitled "Land and Water Area of Counties by Minor Civil Divisions: 1940," and where the area is broken down to the nearest one-tenth of a square mile. To illustrate, the table for Oregon appears at pp. 223-31, and the minor civil divisions used are the election precincts of the counties within the State. At pages 418-21 are maps for various parts of Oregon, showing the exact election precincts

set forth in the table appearing at pp. 223-31. Thus, the combination of the table and the maps gives the exact area of land underlying inland water for each election precinct, and the exact boundaries of each precinct can be identified on the maps.

From the foregoing discussion, it is readily apparent that the Submerged Lands Act "confirmed" and "established" title in the States to 84,585,600 acres of submerged lands and shorelands. Of this figure, 17,029,120 acres were lands within the three-mile belt of the marginal seabed, 38,595,840 acres were lands underlying the Great Lakes, and the remaining 28,960,640 acres were lands underlying other inland navigable waters. And, of the latter figure, Oregon has 403,840 acres, or 631 square miles. The marginal seabed and the lands underlying the Great Lakes are not difficult to identify. Nor are the remaining 28,960,640 acres difficult to identify, because the legislative history of the Submerged Lands Act identifies this area to the nearest one-tenth of a square mile for every election precinct or minor civil subdivision in the United States, as shown on maps of those election precincts and minor civil subdivisions as they existed in 1940.

And the Senate Committee Report declared that these acreages were "very approximate *but are absolute minmiums.*" Senate Report No. 133, March 27, 1953 [To Accompany S. J. 13], 83rd Cong., 1st Sess., p. 76, note 1 in Appendix F. Congress confirmed in the States not only title to these lands, but also to all natural resources, whether fauna, flora or mineral, in such lands and overlying waters.

D. *Language of the Submerged Lands Act*

The pertinent provision of the Submerged Lands Act, now codified as 43 U.S.C. 1311(a), provides:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950 [the date of the Supreme Court decisions in the *Louisiana* and *Texas* cases], entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof. . . .

With respect to inland navigable waters, 43 U.S.C. 1301(a) provides the following definition:

> . . . all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction. . . .

It should again be noted that federal law is applicable to determine whether waters were navigable at the date of admission of a State into the Union, but

thereafter the "law of the respective States in which the land is located" governs and controls to determine who is entitled to such lands (*i.e.*, to resolve questions of accretion, reliction, erosion and avulsion) (see Section VI of this brief, *infra*). More pertinent for present purposes, however, is the scope of the congressional confirmation of state title. It included not only title to the lands identified and described, but also title to natural resources, which included:

> . . .without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life . . . . (43 U.S.C. 1301 (e)).

Congress left no doubt about its intention to confirm in the States title to the beds and shores of all inland navigable waters and to all of the natural resources in such lands and waters.

V. *STATE LAW REQUIRED BY JUDICIAL DECISIONS*

A. *Preface*

It is indisputably clear that, prior to 1967, state law applied to resolve disputes concerning the ownership of the beds of inland navigable waters and their shorelands, including all controversies involving reliction, accretion, erosion, avulsion and all other aspects of riparian rights. This will be demonstrated by a review of the decisions of this Court and applicable federal statutes. Before doing so, however, it is important to bear in mind three important clarifications.

First, the land in dispute in the case before the Court is not federal land which will be limited, diminished, restricted or divested by state rules of property law. It is not federal and at all. If it were land that aways had been in federal ownership, then quite clearly federal decisional law would apply, because, as this Court said in *United States v. Oregon*, 295 U.S. 1 (1935):

> The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control.

In that case, however, the lands in dispute surrounded a small, meandered, *non-navigable* lake. The United States had issued patents to uplands bordering on the meander line, but had, by Executive Order, reserved the area below and within the meander line as a bird refuge. Oregon enacted a statute which asserted state ownership of all meandered lakes within the State, whether navigable or not. Since the lake in question was not navigable, Oregon did not receive title to the lake or its bed at statehood, and title remained in the United States. Thus, this Court held that the Oregon statute could neither divest the United States of title nor determine the effect of the Executive Order.

But it is quite a different matter when title has passed from the United States in accordance with applicable federal statutory and decisional law. Once federal law concludes that title has passed from the Government, then state rules of property law are utilized to measure the nature and limits of the ownership interests

in such land. This Court has consistently expressed this view, well summarized in *Wilcox v. Jackson*, 38 U.S. 498, 517 (1839):

> We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; *but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.* (Emphasis added).

The second important clarification is related to the first, and involves the distinction between the United States as a property owner and claimant, on the one hand, and claims of private parties whose titles are derived from patents issued by the United States. As the following discussion will show, federal law applies in private property disputes *only to the extent necessary to determine whether the patents were effective to convey the federal interest;* and, if so, state law will apply to determine all other ownership questions. When the United States is a party asserting a claim in a proprietary capacity, then federal law applies only if it is necessary to determine whether the United States parted with title, and state law applies to determine the extent of the federal claim when such claim is based on common law rules of property—as explained by *Wilcox v. Jackson, supra;* and see *United States v. Holt State Bank*, 270 U.S. 49 (1926).

The third distinction is an obvious one, and hardly needs to be noted. When the United States exercises regulatory authority, as under the Commerce Clause, the nature and limit of such regulatory authority are always federal questions. But in the present case no such regulatory authority is involved.

With these distinctions in mind, it is interesting to review the decisions of this Court prior to 1967, and to demonstrate that state rules of property were always utilized to resolve disputes such as in the case at bar.

B. *Chronological Examination of Major Cases Prior to 1967*

The cases are numerous and entirely consistent wherein this Court held, prior to 1967, that state rules of property law govern questions concerning title to real property, including disputes involving beds and shores of navigable waters. No useful purpose would be served by attempting to cite all of those cases. It seems to be more productive to select some of the cases which appear to be of greater importance or clarity in demonstrating that riparian rights are to be determined by state rules of property law rather than by federal decisional law.

The cases so selected for review are presented in chronological sequence and an effort is made to show how each of the cases adds to the body of law as it existed at the time it was decided. This Court's language is quoted at length in those instances where it appears to be particularly appropriate to explain the rationale

underlying the decision or where it reveals the interpretation which this Court has placed on its earlier decisions.

1. *1876*: *Barney v. Keokuk*

Barney v. Keokuk, 94 U.S. 324 (1876), is the logical starting point for discussion because it is the first major case to shed meaningful light on riparian rights in navigable waters located above tide-water. To understand the significance of *Barney*, it is necessary first to explain how this Court's extension of federal regulatory power over inland navigable waters gave rise to confusion concerning riparian property interests, and how this confusion resulted in the *Barney* decision.

After the Federal Constitution was adopted, the thirteen Original States viewed tide-waters as navigable (subject to public use) and waters above the ebb and flow of the tide as non-navigable (privately owned), because this had been the law of England, as explained in Section III of this brief. Riparian rights were more extensive in non-navigable waters, but they applied to a lesser extent in navigable waters.

For a number of years this Court followed the English distinction between navigable and non-navigable waters in determining the reach of federal regulatory power under the Commerce Clause and the scope of admiralty jurisdiction under the Judiciary Clause (see, *e.g.*, *The Thomas Jefferson*, 10 Wheat. 428 (1825)). But this country had vast inland waters which were unaffected by the tides, which were physically capable of supporting navigation, and which were very valuable

for that purpose. As a consequence, it was not too long before this Court reversed itself and rejected the English "tidal test" of navigability (*The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443 (1859)), and declared that all waters navigable-in-fact were navigable in law. Waters which were navigable-in-fact were those which were physically capable of supporting meaningful waterborne commerce; and such waters were subject to federal regulation as the "navigable waters of the United States" if they formed a navigable link in interstate or foreign commerce, but they were "navigable waters of the States" if they were navigable intrastate only (*The Daniel Ball*, 77 U.S. 557 (1870)).

These decisions, then, effectively extended federal regulatory power over navigation and admiralty jurisdiction to all inland waters which were navigable in interstate and foreign commerce; and also declared that inland, intrastate navigable waters were subject to state regulatory jurisdiction. This was clear enough for purposes of regulatory jurisdiction, but it created a good deal of confusion with respect to riparian property rights.

Two questions were of paramount importance: (1) how were riparian rights to be defined with respect to the inland navigable waters that previously had been deemed non-navigable under the "tidal" test; and (2) would such definition be supplied by local law or federal law?

These questions were answered by this Court in *Barney v. Keokuk*, 94 U.S. 324 (1876). The dispute

centered upon riparian claims along the shores of the Mississippi River in Iowa. The Court explained the confusion that had arisen as a result of the transition from the "tidal" test of navigability to the test of navigability-in-fact, and noted the unfortunate impact that this had had upon property rights in shorelands—and, most significantly, declared that these property rights must be defined and clarified under state law, and that each State was free to declare its own law. But the language of the Court speaks best for itself:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tidewater at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 id. 471. These cases related to tidewater, it is true; *but they enunciate principles which are equally applicable to all navigable waters.* And since this court, in the case of *The*

Gennessee Chief, 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amendable to the admiralty jurisdiction, *there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.* The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject. (94 U.S. at 338). (Emphasis added).

2. *1894*: ***Shively v. Bowlby***

Eighteen years after the *Barney* decision, the Supreme Court decided *Shively v. Bowlby*, 152 U.S. 1 (1894), and therein summarized how each of the Original States had adapted its common law rules of property to define riparian rights in shorelands of navigable waters. This case is particularly important because it emphatically concludes that state rules of property control all questions concerning riparian rights in shorelands, and because it reviews all of the earlier decisions of the Court to show that the Court had always adhered to that position. *Shively* has also been cited with approval dozens of times by the Court in subsequent decisions. Thus, this decision deserves some further explanation.

Bowlby had received from the State of Oregon a grant of certain lands situated between the high water mark and low water mark of the Columbia River. Shively claimed, through a predecessor in interest, under a prior patent issued by the United States while Oregon was still a Territory, asserting ownership "of all the tide lands and riparian rights and wharfing rights" in front of his patented land.

Thus, Bowlby claimed pursuant to a *subsequent* state grant and Shively claimed pursuant to a *prior* federal grant. Shively contended that the subsequent state grant could not cut off his riparian rights to tidelands and wharfing in the river. The question as to whether a subsequent state grant could limit or eliminate riparian rights claimed under a federal patent was squarely before the Court. The Oregon Supreme Court held that it could. This Court agreed, and in affirming the decree, observed that there had been such:

> . . . a diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high water mark of navigable waters, that this appears to the court to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject. (152 U.S. at 11).

The Court then reviewed at length the early common law of England, and then turned to the various adaptations those common law principles had received in the thirteen Original States, observing:

> The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only. (152 U.S. at 18).

The Court actually reviewed at some length the law of each of the thirteen Original States (Massachusetts, p. 18; New Hampshire, p. 20; Rhode Island, p. 20; Connecticut, p. 20; New York, p. 20; New Jersey, p. 21; Pennsylvania, p. 23; Delaware, p. 23; Maryland, p. 23; Virginia, p. 24; North Carolina, p. 25; South Carolina, p. 25; and Georgia, p. 25). Most of the Original States limited or denied ownership rights of riparians below high water mark.

Having thus evaluated and emphasized the differences in the law of the various States, the Court cautioned:

> The foregoing summary of the laws of the Original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another. (152 U.S. at 26).

The Court then devoted some twenty-five pages to a discussion of its own earlier decisions, pointing out that in each instance, where possible, it had ascertained and applied the law of the State involved (pp. 26-51). The Court, in affirming the Oregon Supreme Court, concluded:

> By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case. (152 U.S. at 57).

It should be noted that in *Shively* the Court found a "federal question" for jurisdiction only by virtue of the fact that the controversy required the construction of the effect and extent of an official grant (patent) by the United States. The Court concluded that the federal grant gave the grantee no rights below high water mark, and that any riparian rights arising by virtue of the patented land were to be determined by the law of Oregon.

McGilvra v. Ross, 215 U.S. 70 (1909), should be noted in connection with *Shively* (even though *McGilvra* is not one of the "major" cases selected for discussion). In *McGilvra*, certain private parties claimed riparian rights under federal patents to Lake Union and Lake Washington in the State of Washington. They

asserted "federal question" jurisdiction, contending that it would be necessary to construe the effect of federal patents, and further claiming that the State of Washington was taking their riparian rights without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution. The Court passed over the latter contention, pointing out that:

> . . . if the appellants did not derive the rights contended for by the patents, they have no rights to be impaired, even assuming, as we have assumed in this discussion, that the action of the State has proceeded far enough to be a trespass upon or an impairment of them. (215 U.S. at 76).

With respect to the other claim of a federal question, *i.e.*, that it would be necessary to construe the meaning and effect of federal patents, the Court pointed out that such would be true only "if prior decisions have not defined such rights and removed them from controversy." The Court summarized the holding in *Shively*, and concluded that there no longer was a federal question because:

> The issue was accurately presented [in *Shively*] between a title under a patent of the United States and one conveyed by a State in the exercise of its dominion over lands below high-water mark. The issue in the case at bar is exactly the same. (215 U.S. at 77).

The Court then considered the contention by the riparian patentees that *Shively* involved navigable waters affected by the tides, whereas Lakes Union and Washington were navigable waters not affected by the

tides, and concluded that non-tidal navigable waters fell within the same category as tidal navigable waters, and that the State of Washington had "full jurisdiction over the lands within its borders, including the beds of streams and other waters" (215 U.S. at 79). This being so, there was no "federal question" to be decided in construing the patents. The patents carried no riparian rights by their own force, and any such rights could only be created or recognized under the law of the State of Washington. Thus, concluded the Court:

> It follows from these views that the Circuit Court of Appeals rightly decided that the questions presented by the bill are no longer open to discussion, and that the Circuit Court was without jurisdiction. (215 U.S. at 80).

3. *1897*: *St. Anthony v. St. Paul*

Despite the thorough review of the earlier cases which the Court offered in *Shively*, much confusion and litigation persisted, and it was only three years later that the Court felt compelled to re-state its position that riparian claims in the shorelands of navigable waters were, and always had been, matters for determination under state law. This restatement came in *St. Anthony Falls Water and Power Company v. St. Paul Water Commissioners*, 168 U.S. 349 (1897). It should be remembered that *McGilvra* was not decided until 1909 (twelve years after *St. Anthony*), and at that later date the Court said riparian claims to shorelands no longer presented a federal question. In *St. Anthony* the riparian owners claimed riparian rights in the Mississippi River, which, they contended, were to be:

> . . . determined by the general law applicable to riparian owners in like situation, which right is not determined conclusively by a state court, and that being property it cannot be taken away or impaired either by other private owners or by the State, except that if the latter should require the use of any portion of the water for any public purpose it may only be taken or diverted upon due compensation being made. These rights, it is claimed, are protected by the Federal Constitution, and that as such claim was duly presented before the state tribunal, the question is now open for review by this court. (168 U.S. at 357).

In response to those assertions by the riparian claimants, the Court gave this emphatic answer:

> . . . we are of the opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota. This principle, we think, has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original States and those which were subsequently admitted to the Union under the provisions of the Federal Constitution. (168 U.S. at 358-59).

The above holding is crystal clear, and there would seem to be no point in dwelling at length on the cases reviewed by the Court to sustain the proposition that it had always been consistent in holding that state law controlled all aspects of riparian rights. But the Court did deem it sufficiently important to require a further review at that time, and for that reason this Court's own interpretation of the effect of its earlier decisions is extremely important. It is also important in view of

the cloud which *Hughes v. Washington*, 389 U.S. 290 (1967), and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), have cast on source of law questions. So, for these reasons, the language of the Court in *St. Anthony* will be quoted at some length to show how the Court characterized its earlier decisions, and thus to show that—as rules of property law—it was fully and firmly confirmed that state law would govern all aspects of riparian right claims. The Court clearly wanted to lay the matter to rest and to prevent such questions from arising in the future.

The Court began its discussion with *Martin v. Waddell*:

> In *Martin v. Waddell*, 16 Pet. 367, it was held that, when the American Revolution was concluded, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. The action was ejectment for 100 acres of land covered with water in Raritan Bay in the township of Perth Amboy, in the State of New Jersey. The claim of the plaintiff was founded upon the charters of Charles II to his brother, the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on the continent of America, the land in controversy being within the boundaries of the charters and in the territory which now forms the State of New Jersey. Those letters patent, as construed by this court, conveyed to the Duke of York all the prerogatives and powers of government residing at the time of their execution in the King

of Great Britain, and passed from the jurisdiction of Great Britain to the people of each State after the Revolution. Although the question in that case arose in regard to lands covered with water in Raritan Bay, yet the principles upon which the case was decided have been stated to apply to the rights of the States in regard to all navigable waters within their jurisdiction. (168 U.S. at 359-60).

The Court then turned to *Pollard v. Hagan*:

> In *Pollard v. Hagan*, 3 How. 212, the question arose in regard to the rights of the State of Alabama in the shores of navigable waters and the soils under them within her limits. The sixth section of the act of Congress, passed on the 2d of March, 1819, 3 Stat. 492, c. 47, for the admission of the State of Alabama into the Union, provided: "That all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefor, imposed by said State." It was held that the Government of the United States did not by reason of that enactment possess any more power over the navigable waters of Alabama than it possessed over the navigable waters of other States under the provisions of the Constitution, and that Alabama had as much power over those navigable waters as the original States possessed over the navigable waters within their respective limits. It was also held that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the States respectively, and the new States had the same rights, sovereignty and jurisdiction over the subject as the original States. (168 U.S. at 360).

The Court then noted *Goodtitle v. Kibbe*:

> In *Goodtitle v. Kibbe*, 9 How. 471, the decision of this court in *Pollard v. Hagan, supra,* was referred to and affirmed, and it was said that, by the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of the navigable rivers *between high and low water mark*, and that after such admission Congress could make no grant of land thus situated. (168 U.S. at 361). (Emphasis added).

The Court considered *Barney v. Keokuk* to be particularly important, and explained the case in the following language:

> In *Barney v. Keokuk*, 94 U.S. 324, it was recognized as the law that the title and rights of riparian proprietors upon the banks of the Mississippi were to be settled by the States within which the lands were included. Mr. Justice Bradley, in stating the opinion of the court in that case, said (at page 338): "And since this court in the case of *The Genesee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view *depended, as most cases must depend, on the local laws of the States in*

which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

It was also said by the same learned justice in speaking of the English idea of navigable waters being necessarily tide waters: "It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell,* 16 Pet. 367; *Pollard's Lessee v. Hagan,* 3 How. 212, and *Goodtitle v. Kibbe,* 9 How. 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters." (168 U.S. at 361-62). (Emphasis as in opinion).

The Court next discussed *St. Louis v. Myers*:

> In *St. Louis v. Myers,* 113 U.S. 566, this court held that the act of March 6, 1820, 3 Stat. 545, admitting the State of Missouri into the Union, left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "The act of Congress providing for the admission of Missouri into the Union, act of March 6, 1820, c. 22, 3 Stat. 545, and which declares that the Mississippi River shall be 'a common highway and forever free,' has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of state law." (168 U.S. at 362).

Packer v. Bird was reviewed next:

> In *Packer v. Bird,* 137 U.S. 661, it was held, that as the highest court of California had decided that the Sacramento River being navigable in fact, a title upon it extends no farther than to the edge of the stream, this court would accept that decision as expressing the law of the State. That case asserted the right of each State to determine the extent of the title and of the rights of the riparian owners in waters within the territory of the State. It was also stated that the Federal courts must construe grants of the General Government without reference to the rules of construction adopted by the States for grants by them, but that whatever incidents or rights attach to the ownership of property conveyed by the United States bordering on navigable streams, would be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. It was further said that: "As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."

It does not impair the efficacy of the grant or the use and enjoyment of the property by the

grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States. (168 U.S. at 363).

The Court then explained the effect of *Hardin v. Jordan*:

> In *Hardin v. Jordan*, 140 U.S. 371, it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the State in which the lands lie, and that it depends upon the law of each State to what extent the prerogative of the State to lands under water shall extend. In the opinion, after stating that the title to the shore and lands under water is in the State and is regarded as incidental to its sovereignty, it is said: "Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce . . . . Sometimes large areas (of land) so reclaimed are occupied by cities and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce and subjecting the lands to the necessities and uses of commerce" (citing cases). Continuing, the court said: "This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable rivers, as the Mississippi, the Missouri, the

> Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends upon the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

Mr. Justice Brewer, in his dissenting opinion (p. 402) in the above cited case, which was concurred in by Mr. Justice Gray and Mr. Justice Brown, agreed: "That the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnish the best and the final authority." And the dissent was based upon the theory that although the right of the State to determine this matter was not questioned in the prevailing opinion, there was, nevertheless, error committed by the majority of the court in refusing to follow a decision of the state court on the very question then under review, and in following instead thereof previous decisions of the state court inconsistent therewith. (168 U.S. at 363-64).

Next came *St. Louis v. Rutz*:

> In *St. Louis v. Rutz*, 138 U.S. 226, 242, cited in the dissenting opinion above referred to, it was said by Mr. Justice Blatchford, in delivering the opinion of the court: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property which is governed by the local law of Illinois." (168 U.S. at 364).

Then, *Kaukauna v. Green Bay*:

> In *Kaukauna Water Power Company v. Green Bay & Mississippi Canal Co.*, 142 U.S.

254, Mr. Justice Brown, in delivering the opinion of the court, said at page 271: "It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels (citing cases). In *City of Janesville v. Carpenter*, 77 Wisconsin, 288, 300, it is said of the riparian owner: 'He may construct docks, landing places, piers and wharves out to the navigable waters, if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless he injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for any one's private use.' With respect to such rights, we have held that the law of the State, as declared by its Supreme Court, is controlling as a rule of property." (168 U.S. at 364-65).

The Court finally concluded its review of the cases with its then-recent decision in *Shively v. Bowlby*:

> In *Shively v. Bowlby*, 152 U.S. 1, it was again said that the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters and in the lands under them within their respective jurisdictions. It was also remarked that, upon the question, how far the title of the owner

> of the land extends bounding upon a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different States; and that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The suit was in the nature of a bill in equity brought to quiet title to lands below high-water mark in the city of Astoria, the question involving the rights in navigable waters as between the State and others. The opinion at page 57 states as follows: "By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court above referred to, the law of Oregon governs the case." The opinion refers to all the cases which we have above cited and many others, upon the various questions which are discussed in the case, and recognizes the rule that it belongs to the States to decide as to the character and extent of the riparian rights of owners upon navigable waters within such States. (168 U.S. at 365).

Having concluded the review of the earlier decisions, the Court summarized the essence of those decisions. In so doing, the Court noted that none of the prior cases had involved an ownership conflict between the State and riparian owners to flowing waters, as did the *St. Anthony* case, but pointedly noted that many of the cases did involve claims of the United States to shorelands, and said that the same result should follow—

i.e., that these matters should always be determined by state law:

> It is true that in these various cases the exact point in controversy in this case in regard to the rights of the State as against riparian owners has not arisen. The dispute has generally been as to the extent and character of the title as between the United States or the State and the riparian owner to lands under water, and as to the right of the riparian owner to build out from the shore piers or wharves so as to reach the navigable portion of the stream; but the principles laid down in all of these cases necessarily include the right of the state courts to decide, as a matter of local law, the point now under discussion, subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers. *The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court.* The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review. (168 U.S. at 365-66). (Emphasis added).

4. *1905*: *Joy v. City of St. Louis*

To keep the chronological perspective, *Joy v. City of St. Louis*, 201 U.S. 332 (1906), was decided nine years after *St. Anthony*. The principal significance of *Joy* is that the dispute was over accretion land formed after the date of patent to a riparian owner along the Mississippi River (exactly the same situation as in *Hughes* and *Bonelli*). The Court first observed:

> The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises. It was said in *Blackburn v. Portland &c. Co.*, 175 U.S. 571, that "this court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question." The same principle was held in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, and also in *De Lamar's Gold Mining Co. v. Nesbitt*, 177 U.S. 523. (201 U.S. at 341).

The Court then characterized the nature of the dispute, and ruled that state law controlled:

> In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed. There is no dispute as to the terms of the patent or of the acts of Congress. The language of the averment in the petition (which is set out in full in the foregoing statement of facts) shows that the controversy in dispute is not at all in regard to the land covered by the letters patent or by the acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, "which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, between said north and south lines of said outlot, confirmation and surveys, and which thereby became a portion of the land granted by said letters patent and acts of Congress approved June 13, 1812, and June 6, 1874, respectively."

Now, whether the land contained in the orig-

inal patent reached to the Mississippi river as its eastern boundary, under the distances called for by the patent, would be a question of fact, as was stated in *Sweringen v. St. Louis*, 185 U.S. 38, and whether the plaintiff is, upon the facts set forth, entitled to the accretion, is a question of local or state law, and is not one of a Federal nature. *St. Anthony Falls &c. Co. v. St. Paul Water Commissioners*, 168 U.S. 349, 359, and cases cited. In *Packer v. Bird*, 137 U.S. 661, it was held that while the Federal court would construe grants of the General Government without reference to the rules of construction adopted by the States for grants by them, *yet whatever incidents or rights attached to the ownership of the property conveyed by the United States bordering on a navigable stream* would be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. To the same effect is *Shively v. Bowlby*, 152 U.S. 1. In the opinion in that case, at page 57, it is said: "By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case."

As this land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States. (201 U.S. at 342-43). (Emphasis appears in opinion).

5. *1918*: *Arkansas v. Tennessee*

Arkansas v. Tennessee, 246 U.S. 158 (1918), decided thirteen years after *Joy*, is particularly pertinent to the case at bar because it dealt with an avulsion which exposed substantial segments of a riverbed and precipitated various claims to ownership of the exposed area (in the case now before the Court, of course, the primary dispute is over submerged and adjacent lands in the new channel). In any event, this Court made clear that local law must be applied, explaining that any conflict:

> . . . between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . (246 U.S. at 175).

6. *1926*: *United States v. Holt State Bank*

United States v. Holt State Bank, 270 U.S. 49 (1926), is of particular importance because the United States asserted a proprietary claim, as against private persons who claimed under the laws of the State of Minnesota, to the bed of Mud Lake. The fact that the United States was a party and a property claimant made no difference, and the Court applied Minnesota law in determining that the claims of the United States were without merit.

But the case is best explained by a preliminary ref-

erence to the Circuit Court's opinion (294 F. 161 (1923)). The sequence of events was as follows: (1) The United States issued patents to the uplands bordering on the meander line of Mud Lake; (2) then, certain litigation in the state court of Minnesota resulted in a decree that the dry lake bed belonged to the upland riparian patentees by virtue of the Minnesota doctrine of reliction; and (3) the United States thereafter surveyed the bed of the lake within the meander line and declared such land to be open for entry under the homestead laws (see 294 F. at 163). The basic claim of the United States was that the lake was never navigable; that as a result the State of Minnesota never acquired title to the bed thereof at statehood; and that the United States had thus retained title. The Circuit Court stated the issue in this fashion:

> Reduced to its lowest term, the case presents the single question: Is the United States the owner or are the homesteaders to whom it sold the lands bordering on Mud Lake in 1906 and subsequent years, and their successors in interest, the owners of the land in its bed. . . .
>
> It is determined by the law of the state where the land lies, where the waters are navigable, subject only to the paramount right of the United States to regulate and improve the navigation of those waters for commercial and public purposes. (Citing cases). (294 F. at 164).

The Circuit Court then observed:

> We turn then to the local law of the state of Minnesota to ascertain the rights and interests of homesteaders to whom the United States granted the lands on the shores of Mud Lake in the lands in the bed of the lake. (294 F. at 165).

The court concluded that under Minnesota law the dry lake bed was relicted land, and belonged to the private patentees who had received upland grants from the United States—and that the United States had no claim at all. The court then went on to conclude that the navigability of Mud Lake was also to be determined by state rather than federal law. (294 F. at 165-66). As will be seen, this latter conclusion was in error.

On appeal to this Court (270 U.S. 49), the Circuit Court's opinion was affirmed, although application of state law to determine navigability was disapproved:

> Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co. v. United States, supra,* p. 87. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended. But not withstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable. (270 U.S. at 55-56).

The Supreme Court reviewed the evidence relating to navigability and concluded that Mud Lake was

navigable under the federal test. (270 U.S. at 56-57). And so the lower court's error was harmless in this regard.

However, with respect to the lower court's use of state law to resolve the reliction dispute between the United States and private claimants, this Court expressly affirmed the applicability of state law:

> We conclude that the State on its admission into the Union became the owner of the bed of the lake. It is conceded that, if the bed thus passed to the State, the defendants have succeeded to the State's right therein; *and the decisions and statutes of the State brought to our attention show that the concession is rightly made.* (270 U.S. at 59). (Emphasis added).

It was clear beyond any question that state law would be applied to resolve riparian claims and conflicts, even though the United States was a claimant.

The cases cited and quoted above present an accurate picture of the position which this Court always embraced prior to 1967. Then, when this Court decided *Hughes* in 1967 and *Bonelli* in 1973, it departed from the foregoing line of cases and applied federal decisional law to resolve riparian disputes in Washington and Arizona, respectively. This is ironic, in a way, because there are even more persuasive reasons why state law should control riparian conflicts in the Western United States, as explained in the following section of this brief.

C. *Federal Law Particularly Unsuited for Appropriation States*

1. *Preface*

In *Hughes* and *Bonelli* this Court was concerned that grantees of the United States might be denied certain riparian attributes of their uplands unless federal law was applied. This was erroneous for two basic reasons. First, as shown above, prior to 1967 this Court repeatedly held that federal grants and patents carried no riparian rights, and there are no riparian attributes of titles derived from the United States. And, second, many Western States do not recognize, and have never recognized, riparian rights. They have adopted in lieu thereof the "appropriation" system of determining rights in watercourses.

The appropriation system was designed to regulate diversions and uses of water, and was not directly concerned with questions relating to accretion, reliction, erosion and avulsion. However, since the appropriation system was entirely inconsistent with the riparian system, many Western States refused to adopt any part of the riparian system. A common result was that boundaries of navigable waters became fixed at statehood and did not fluctuate as a result of accretion and reliction (as was the law of Washington and Arizona, which the Court set aside in *Hughes* and *Bonelli*).

Once again, it is important to emphasize that whether federal grants and patents carry riparian rights was at one time a federal question, but that question

was answered in *Shively*. This Court had always, said, prior to 1967, that they did not. It always has been and remains a federal question to determine the boundaries of navigable waters at the date of statehood, so that the geographic measure of the state's entitlement under the equal footing doctrine can be ascertained. But after this is done, and after the States thus receive title, they are free to adopt the appropriation system and to refuse to recognize any aspects of the riparian system.

Several States could be selected to illustrate why riparian rights were never recognized, but Utah is the example selected for the following discussion. It will be shown not only that riparian rights have never been a part of the law of Utah, but also that Congress concurred in that result, and this Court confirmed it.

2. *Birth of the Appropriation System*

On July 24, 1847, Brigham Young and the Mormon pioneers entered the wilderness of the Great Salt Lake Valley, then a part of Mexico, but to become a part of the United States a year later (*Treaty of Guadalupe Hidalgo*, July 4, 1848, 9 Stat. 922). The Mormons were the first Anglo-Saxons to practice extensive irrigation in the United States. (Hutchins & Jensen, *The Utah Law of Water Rights*, p. 1 (1965)). On the very day of their arrival in the valley, history records that the Mormons commenced irrigation:

> On July 24th, 1847, William Carter, one of the members of Pratt's hundred, undaunted by the report of the first surveying committee, dedicated a tract of arid land to the Lord, cut a trench

> which would convey the waters of City Creek to the field, planted a few potato seeds, and prayed that the labors of the Saints might be blessed. The ground was so dry that it was necessary to irrigate it before ploughing it. (Brough, ***Irrigation in Utah***, John Hopkins Press, 1899).

Others followed suit. Less than one month later (August 22, 1847), at the first general conference of the Mormon Church, Brigham Young "moved that Edson Whipple receive an appointment to attend to the distribution of water over the ploughed lands." (Brough, *op. cit, supra*, at 17). The early institutional arrangements for administration of water rights in the Salt Lake Valley are summarized as follows:

> The fact that the original town sites were located on some living mountain stream, having a sufficient flow of water to supply the demands for irrigation in the fields, and for culinary purposes in the settlement, had an important effect on the customary law regulating the control and distribution of water. For before the system of priority of rights was introduced, the city and town authorities, by common consent, assumed the powers of controlling and distributing the water. When no regularly constituted council existed the entire community constituted a committee or directory, and employed a watermaster on an annual salary, or with the understanding that the distributor should be paid by levying an assessment on the ratio of acreage under cultivation. The duties of the watermaster consisted in equitably distributing the water among the users, deciding disputes as to the proportionate share of each user, and levying such taxes as were necessary to keep the canals and dams in repair. (Brough, *op. cit., supra*, at 17).

This, of course, constituted an effective repudiation of the common law regime of riparian rights. But the common law was of no relevance at that time, anyway, because, as observed above, all of this happened in what *at that time was a part of Mexico.*

When the United States acquired the Great Salt Lake Valley from Mexico in 1848, the appropriation system of water rights had already been created and riparian rights had been abolished (in fact, had never been in existence). Land had been allocated to the settlers, and these early possessory rights, both with respect to land and water, were recognized by the "State of Deseret" and the Territory of Utah, and formal land titles were ultimately issued by the United States. (See Kinney, *A Treatise on the Law of Irrigation and Water Rights*, 2d ed., vol. 4, §§2055-59 (1912); and Hutchins, *Mutual Irrigation Companies in Utah*, pp. 9-16 (1927). When first called upon to consider riparian rights, the Utah Supreme Court held that riparian rights had never been a part of Utah property law. *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 52 Utah 347, 174 Pac. 852 (1918).

3. *Congressional Approval of Appropriation System*

The Territory of Utah was established September 9, 1850. (9 Stat. 453). Water rights litigation did not flourish in Utah because disputes between users were resolved by the administrative machinery created by the Mormon Church. But in other Western States the early cases demonstrated the confusion which arose between claims of appropriators and riparians. In *Irwin*

v. Phillips; 5 Cal. 140 (1855), the contest was between two gold miners, with one claiming riparian rights and the other claiming appropriation rights. The appropriator prevailed, since the court recognized the need for the appropriation system and the non-utility of the riparian system in the West. (Compare *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882)).

In the early cases the litigants almost always were "trespassers" on the public domain of the United States, and so they were not riparian "owners" in the true sense of the word. This cast some cloud on appropriation water rights, as to whether subsequent patentees of riparian land could then claim riparian rights which would prevail over established appropriation rights. Stated another way, the United States was the "riparian owner" since it owned the public domain, and the United States would thus own any riparian rights that might be recognized. Stability of appropriation water rights could only be achieved if the United States waived or relinquished its riparian rights in favor of the appropriation system.

Congress complied, because Congress favored settlement and development of the West. This congressional policy is manifest in numerous land grant acts, railroad grant subsidies, *etc.* But three acts are of particular relevance. In 1866 Congress passed a statute, essentially a mining act, which confirmed private rights in certain lands occupied by miners. Section 9 related to water:

That whenever, by priority of possession, right

> to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . . (14 Stat. 251, 253, 1866, as amended, 43 U.S.C. §661).

Four years later, Congress passed another statute which said that land grants theretofore or thereafter executed were to be subject to all water rights recognized by Section 9 of the 1866 Act, as quoted above. (See 16 Stat. 217, 218, 1870, as amended, 43 U.S.C. 661). The third statute was the Desert Land Act of 1877, which provided that 'all surplus water over and above . . . actual application and use . . . shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." (19 Stat. 377, 1877, as amended, 43 U.S.C. §321). There was also a provision to protect the federal regulatory authority over navigation, but the clear congressional intent was to waive or relinquish the United States' riparian rights in favor of the appropriation system, so that federal patentees would have no riparian rights in appropriation States.

Riparian rights, where recognized, are appurtenant to the land and pass with title to the land. But the foregoing statutes abolished riparian rights in federal lands in the West, and patentees claiming through the United States cannot claim riparian rights to water use by virtue of the patents. If they have riparian rights at

all by virtue of their ownership of riparian land, such rights are created under the water laws of the respective States. But all of this might not have been entirely clear until 1935, when this Court spoke, as noted below.

4. *Supreme Court Clarification and Confirmation*

The various States in the West applied their own interpretations to the federal statutes mentioned above. Oregon ruled that the Act of 1877 abolished the common law doctrine of riparian rights, except for domestic and stock watering purposes, but held that riparian rights did attach to land patented prior to 1877. (*Hough v. Porter,* 51 Ore. 318, 98 Pac. 1083 (1909)). South Dakota reached essentially the same result. (*Cook v. Evans,* 45 S.D. 31, 185 N.W. 262 (1921)). But California and Washington construed the Act narrowly, restricting it to Desert Land entries. (*San Joaquin & Kings River Canal & Irr. Co. v. Worswick,* 187 Cal. 674, 203 Pac. 999 (1922); *Still v. Palouse Irrigation & Power Co.,* 64 Wash. 606, 117 Pac. 466 (1911)). Similar inconsistencies existed among other States. There was a vital need for clarification by the Supreme Court with respect to the exact meaning and effect of these federal statutes.

That clarification came in 1935. There had been some dictum by the Court in 1903 to the effect that the States were free to reject riparian water rights doctrines under these statutes. (*Gutierres v. Albuquerque Land and Irrig. Co.,* 188 U.S. 545, 556 (1903)). But the dispositive pronouncement of this Court came in *California Oregon Power Co. v. Beaver Portland Cement*

Co., 295 U.S. 142 (1935), where Justice Sutherland, speaking for a unanimous Court, explained the source of state power to create appropriative rights in water on federal land; and where it was made clear that the 1866, 1870, and 1877 acts served to strip federal patentees of any claim to riparian rights.

The Court desired to validate and confirm the property rights that had been created under state law, despite the conflicting interpretations which the state courts had placed on the federal legislation, and so it was held that the States were free to adopt their own systems of water law, accepting or rejecting whatever principles of riparian rights they wished to accept or reject.

With this freedom, some States adjusted their rules of law to better suit their local needs, realizing that no uniform federal standard was to be imposed upon them. South Dakota, for example, overruled *Cook v. Evans*, *supra*, and held that riparian rights could attach in that State to patents issued after 1877 (*Platt v. Rapid City*, 67 S. Dak. 245, 291 N.W. 600 (1940)).

VI. *STATE LAW REQUIRED BY FEDERAL STATUTES*

Congress has specifically declared that all questions relating to the ownership of the beds and shorelands of inland navigable waters shall be determined by state law. This can be illustrated by reference to the Submerged Lands Act and the Judiciary Act.

A. *The Submerged Lands Act*

Congress enacted the Submerged Lands Act to confirm in the States title to the beds and shorelands of all inland navigable waters and to a three-mile belt of the bed of the marginal sea, as discussed in some detail in Section IV of this brief, *supra*. So far as relevant here, the section which confirms title in the States declares that:

> It is determined and declared to be in the public interest that (1) title to and ownership of the *lands beneath navigable waters* within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources *all in accordance with applicable State law* be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto *under the law of the respective States in which the land is located*, and the respective grantees, lessees, or successors in interest thereof. *43 U.S.C. 1311 (a)*. (Emphasis added).

The two separate declarations that state law shall govern all ownership questions are clear enough. What might need clarification, however, is the phrase "lands beneath navigable waters." That clarification is provided by Section 1301(a) (1) of the Act:

> The term "lands beneath navigable waters" means—all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the

> laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction.

Thus, "lands beneath navigable waters" includes all lands within the ordinary high water mark of the inland navigable waters located within the respective States. Congress clearly provided that ownership and management of these lands shall be "in accordance with applicable State law," and that the claims of the States and all other persons shall be determined by "the law of the respective States in which the land is located." Thus Oregon law governs the present dispute. Nothing could be clearer.

B. *The Judiciary Act*

Congress has also provided for application of state law by virtue of the judiciary act. The original judiciary act provided that state law should apply in all cases except where the Federal Constitution, treaties or statutes required construction:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in all cases where they apply. *Act of Sept. 24, 1789, 28 U.S.C. 725.*

***Swift v. Tyson*, 16 Pet. 1 (1842)**, mistakenly interpreted this statute as applying essentially to state statutory law only, except as to "rights and titles to things having a permanent locality, such as the rights and titles to real estate." In the latter event, state decisional (as well as statutory) law applied. But ***Erie v. Tompkins*, 304 U.S. 64 (1938)**, said the *Swift* view was erroneous because it was too restrictive, and that state *decisional* as well as *statutory* law governed all cases except where it was necessary to construe a federal constitutional provision, treaty or staute. In *Erie* the Court made clear that the question was not one of statutory construction, but one of adhering to constitutional requirements:

> Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. *304 U.S. 64, 78 (1938).*

And, further, that:

> . . . in applying the [*Swift v. Tyson*] doctrine, the Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States. *304 U.S. 64, 79-80 (1938).*

The constitutional implacations of source of law questions are explained in Section VII of this brief, *infra*, and the subsequent erosion of the *Erie* doctrine is noted. For present purposes, two observations are important. First, even under the *Swift* doctrine, state statutory and decisional law was applied to govern ques-

tions relating to title to real property. Second, Congress amended the judiciary act ten years after the *Erie* decision (*Act of June 25, 1948, 62 Stat. 944, 28 U.S.C. 1652*), restated the essence of Section 24 of the original judiciary act, and fully concurred in the *Erie* declaration that local law should apply:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in all cases where they apply.

The above statute is still in force. Since the present conflict concerns property rights in Oregon, and since this dispute requires no judicial construction of any provision of the Federal Constitution, or of any federal treaty or statute, it is clear that the "laws of the several states" apply, and "shall be regarded as rules of decision in civil actions in the courts of the United States."

VII. *STATE LAW REQUIRED AS A CONSTITUTIONAL NECESSITY*

The question whether federal or state decisional law should be applied to resolve the present property dispute before the Court may have serious constitutional implications.

As a basic premise, federal decisional law should apply only to the extent that it is necessary for the

Court to construe the United States Constitution or a federal treaty or statute.

Article III, Section 2, of the United States Constitution is the sole source of the judicial power conferred upon the United States by the thirteen Original States, and includes:

(a) All cases arising under the constitution, laws and treaties of the United States;

(b) Admiralty and maritime jurisdiction;

(c) Cases involving certain parties, such as ambassadors, consuls, public ministers; controversies to which the United States is a party; and controversies between two or more states, between citizens of different States, *etc.*

The first category mentioned above is the one here involved, and is the constitutional basis for both "federal question" jurisdiction and "federal questions" for source of law. The specific language of Article III, Section 2, relating to federal questions is:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority.

At issue is whether questions of title to real property underlying or adjacent to an inland navigable river are property matters to be resolved by federal or by state law. It does not appear that any provision of the Federal Constitution or any federal treaty or staute requires construction by the Court.

But, even assuming that some provision of a federal statute was involved (such as a grant or patent issued pursuant to a federal statute), then what is the test of the "construction" which creates a federal question? In *Shulthis v. McDougal*, 225 U.S. 561 (1912), various parties claimed title to lands under certain laws of the United States, and in denying federal jurisdiction for want of a substantial federal question, the Court made the following observation:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. (225 U.S. at 569).

Even when source of title might be dependent upon the effect of a treaty, there is no federal jurisdiction based on a substantial federal question unless the construction given the treaty will determine the outcome of the case. In *Romie v. Casanova*, 91 U.S. 379 (1875), a writ of error to the Supreme Court of California was dismissed for lack of jurisdiction where the city of San Jose held title to certain land, even though it was not clear whether such title existed solely by virtue of rights acquired before the cession of California to the United

States, or whether the Treaty of Guadalupe Hidalgo and certain federal statutes served to vest or confirm title:

> The title of the city was not questioned, even if it depended upon the treaty of Guadalupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it. (91 U.S. at 381).

A very substantial body of case law follows this view: *Colorado Central Mining Co. v. Turck*, 150 U.S. 138 (1893); *Florida Central & P. Railroad Co. v. Bell*, 176 U.S. 321 (1900); *Gold-Washing and Water Co. v. Keyes*, 96 U.S. 199 (1877); *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936); *McStay v. Friedman*, 92 U.S. 723 (1875); and *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900).

In *Blackburn v. Portland Gold Mining Company*, 175 U.S. 571 (1900), the Court reviewed a number of its earlier decisions, concluded that there was no federal question and thus no jurisdiction in a title dispute involving mining locations made under federal statutes, unless the controversy hinged on the interpretation of such statutes, and tersely observed:

> This court has *frequently* been *vainly* asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question. (175 U.S. at 579) (Emphasis added).

The foregoing cases illustrate how "federal questions" have been construed by the Court in litigation involving title to real property. How are these cases related to the constitutional grant of judicial power in all cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority?"

A page of history will sharpen this constitutional focus. Following the adoption of the United States Constituion, the first judiciary act provided that:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. Act of Sept. 24, 1789, 28 USC §725.

Swift v. Tyson, 16 Pet. 1 (1842), involved a question of commercial law where a bill of exchange had been taken for value, without notice of any defenses to payment, and before maturity; and it was held that federal commercial and contractual law would apply to determine the rights of the parties. Even under this doctrine, however, the court thought it clear that "rights and titles to real estate" were matters to be determined by local law. The court concerned itself primarily with *congressional intent* in the enactment of the judiciary act, rather than with constitutional grants and limitations, holding that the act was to be limited:

> . . . to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, *and to rights and titles to things having a permanent locality, such as the rights and titles to real estate*, and other matters immovable and intraterritorial in their nature and character. (16 Pet. at 18) (Emphasis added).

The *Swift* doctrine received widespread criticism, perhaps reaching its greatest intensity in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928), where Justice Holmes, dissenting and expressing criticism of the *Swift v. Tyson* doctrine, said at page 532:

> If I am right the fallacy of the *Swift v. Tyson* holding has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.

The *Swift* doctrine experienced its demise in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The facts before the Court in *Erie* required only a determination as to whether federal or state decisional law should apply in federal courts to assess liability for negligence in a tort action, in the absence of an state or federal statute.

The Court could have limited its decision to those facts, either preserving or gradually eroding the *Swift* doctrine. But Mr. Justice Brandeis, speaking for the court, and after reviewing the disservice of *Swift* in nearly a century of experience with it, concluded that preservation or rejection of that doctrine was not a matter of judicial discretion or statutory construction,

but that the entire doctrine had to be repudiated as a matter of constitutional necessity:

> The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so. (304 U.S. at 77-78).

The Court then went on to explain that:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. (304 U.S. at 78).

The statute under review in *Erie* was not invalidated, merely reconstrued:

> In disapproving that doctrine we do not hold unconstitutional §34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine, this Court

> and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States. (304 U.S. at 79-80).

In *Erie* the Court seemed to be persuaded toward its holding by a law review article published in 1923, (Warren,[1] *"New Light on the History of the Federal Judiciary Act of 1789,"* 37 Harv. Law Rev. 49 (1928)), wherein the early history of Section 34 of the Judiciary Act was reviewed (including earlier drafts of the statute prior to its enactment, and other pre-enactment documents), and where it was concluded by the author that (1) the very purpose of the statute was to assure that the rules of decision as well as the statutes of the States would apply in federal courts where no federal question was involved; and (2) if the Court in *Swift* had been aware of the early history of the statute, that doctrine never would have resulted. The importance placed by the Court on this article is reflected in the following language from the opinion:

> The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given §34, and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all

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[1]Charles Warren was later appointed Special Master in **United States v. Utah**, 238 U.S. 64 (1931).

> matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written. (304 U.S. at 72-73).

A number of cases following *Erie* clearly confirmed that all lower federal courts in diversity cases were to apply the law of the respective States (*Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Six Companies v. Joing Highway District No. 13*, 311 U.S. 180 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); and that the mandate applied to cases in equity as well as at law (*Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Ruhlin v. New York Life Inc. Co.*, 304 U.S. 202 (1938)).

It is not now contended that *Erie* has remained entirely intact, or that there is no federal common law. What is contended, however, is that *Erie* rejected *Swift* as an unconstitutional invasion of the rights of the States to apply their own local law when a substantial federal question was not involved. And, even under *Swift*, title disputes concerning real property were always resolved by local law. Ironically, in the same year that *Bonelli* was decided, this Court observed that "Even when federal general common law was in its heyday, an exception was carved out for local laws of real property." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973).

So the argument really boils down to this: If some sort of federal common law is to be applied in the present case, then the result is not only to reject *Erie* totally, but it even requires advancing the use of federal common law far beyond the *Swift* doctrine. In *Erie*, this Court said that *Swift* was an unconstitutional invasion of the right of the States to apply their local rules of property law—surely the Court should not now reject *Erie* and return to the repudiated doctrine of *Swift*.

VIII. *THE FIRST DEPARTURE: HUGHES v. WASHINGTON IN 1967*

A. *Preface*

In *Hughes v. Washington*, 389 U.S. 290 (1967), this Court held for the first time that federal decisional law must be applied to resolve a riparian property dispute. Before turning to that decision, it is necessary to examine the route traveled by the Court to reach the *Hughes* result. As will be seen, the *Hughes* decision was based on a circuit court's mistaken view of *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935). Therefore, it seems appropriate first to consider what the *Borax* case actually involved and what this Court actually held.

B. *Borax v. Los Angeles in 1935*

It was a quote taken out of context from the language of *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935), which apparently caused this Court in 1967 to depart from prior precedent under

the impression that *Borax* was supporting authority for the decision in *Hughes*. As a matter of plain fact, nothing could be farther from the truth. That rather famous quote will be noted in a moment, but first it may be helpful to explain what *Borax* really held, and why that case is fully consistent with the earlier pronouncements of the Court—as reviewed above.

In dispute was a tract of land in Los Angeles Harbor. Los Angeles claimed pursuant to a legislative grant from the State of California; Borax claimed as a successor in interest to a patentee of the United States. The nature of the conflict is of critical importance. Borax claimed under a federal patent which specifically described and conveyed a surveyed lot containing "eighteen acres, and eighty-eight hundredths of an acre" (296 U.S. at 13), but Los Angeles contended that the patent erroneously included state-owned tideland which rightly belonged to the City under its grant from the State.

Thus, the question was *not* whether any riparian rights attached to land conveyed by federal patent; but, rather, *whether the federal patent, itself, was valid.* This, of course, has always been a federal question (see, *e.g.*, *Wilcox v. Jackson*, 38 U.S. 498 (1839)).

A preliminary question was whether the validity of the patent could be collaterally attacked. The federal district court held that it could not, because the survey, the plat, and the patent were within the exclusive statutory jurisdiction of the General Land Office, and so the trial court thought the administrative action

was conclusively binding on the City of Los Angeles, the State of California and the United States (296 U.S. at 14). The circuit court disagreed; this Court then granted certiorari. With respect to the finality of the acts of the General Land Office, this Court first observed that tidelands were owned by the State, and the United States was without power to convey lands that it did not own:

> It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined. (296 U.S. at 16).

Therefore, this Court concluded that the federal statutes which conferred authority on the General Land Office were intended to apply only to the "public lands" of the United States, and could not be construed to authorize the Land Office to survey, sell and patent land that the United States did not own:

> Obviously these laws had no application to lands which belonged to the States. Specifically, the term "public lands" did not include tidelands. (296 U.S. at 17).

And, further, that:

> The question before us is not as to the general authority of the Land Department to make surveys, but as to its authority to make a survey, as a basis for a patent, which would preclude the State or its grantee from showing in an appropriate judicial proceeding that the survey was inaccurate and hence that the patent embraced

land which the United States had no power to convey. (295 U.S. at 18).

The patent was thus valid only to the extent that it conveyed federally-owned upland, and was invalid to the extent that it purported to convey state-owned tideland. The question, then, was *whether the tract in question was upland or tideland.* And that question could only be answered in light of some definition of the federal boundary to mark the extent of the uplands, to distinguish them from the state-owned tidelands. There was some question as to which high-tide line should be used, whether it should be the "mean high-tide line" or the line of the "neap tides." (296 U.S. at 21-22). After some discussion, this Court concluded that the correct boundary would be the mean high-tide line over a period of 18.6 years, explaining:

> In determining the limit of the federal grant, we perceive no justification for taking neap tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high tide line which, as the Court of Appeals said, is neither the spring tide nor the neap tide, but a mean of all the high tides. (296 U.S. at 26).

The measure of the high-tide line is not important for present purposes. But what is important—vitally important— is that the measure of the high-tide line boundary is clearly a federal question. As the Court noted in the above quote, the measure of the boundary

is necessary in "determining the limit of the federal grant." It was simply a matter of determining the validity of a federal act. And this was the very point which the Court emphasized when it used the following language (which was later to be relied on by this Court in *Hughes*):

> Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer v. Bird*, 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co. v. United States*, 260 U.S. 77, 87; *United States v. Holt Bank*, 270 U.S. 49, 55, 56; *United States v. Utah*, 283 U.S. 64, 75. (296 U.S. at 22).

But this observation was merely a preface to this Court's relevant holding in *Borax* with respect to riparian rights in tidelands. Indeed, in the very next sentence the Court routinely declared that state law applied to determine riparian rights in shorelands adjacent to uplands:

> Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney v. Keokuk*, 94 U.S.

> 324, 338; *Shively v. Bowlby, supra*, p. 40; *Hardin v. Jordan*, 140 U.S. 371, 382; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U.S. 56, 63. (296 U.S. at 22).

Thus, when the case was re-tried in the federal district court everyone understood that state rules of property law were to be applied to resolve ownership claims in the tidelands. In that decision, 20 F.Supp. 69 (S.D. Cal. 1937), the State law of estoppel was found to be controlling; the decision was affirmed on appeal (102 F.2d 52 (9th Circ. 1939)); and this Court denied certiorari (307 U.S. 644 (1939)).

Borax is completely consistent—in rationale and *ratio decidendi*—with the earlier decisions of the Court.

C. *Prelude to Hughes: U.S. v. Washington in 1961*

Simply stated, *United States v. Washington*, 294 F.2d 830 (9th Circ. 1961), involved a dispute between the State of Washington and the United States to accretions that had formed along the Pacific Ocean after the date of statehood. The district court applied the state property law of Washington, but the circuit court reversed, acting on the mistaken impression that *Borax* required the application of federal decisional law:

> In urging that federal law controls, the Government relies primarily upon the holding in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9. In that case Borax Consolidated, claiming as upland owner under a federal patent, brought an action to quiet title to land alleged to be tideland situated

> in the inner bay of Los Angeles Harbor. It was apparently agreed that the company's land extended to the high-water mark, but there was controversy as to how this mark was to be determined. Declining to be bound in its determination by the definition of the term "ordinary high-water mark" under California law, the court said: "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Packer v. Bird, 137 U.S. 661, 669, 670 [11 S.Ct. 210, 34 L.Ed. 819]; Brewer-Elliott Oil [& Gas] Co. v. United States, 260 U.S. 77, 87 [43 S.Ct. 60, 67 L.Ed. 140]; United States v. Holt [State] Bank 270 U.S. 49, 55, 56 [46 S.Ct. 197, 70 L.Ed. 465]; United States v. [State of] Utah, 283 U.S. 64, 75 [51 S.Ct. 438, 75 L.Ed. 844]. Rights and interests in the tideland which is subject to the sovereignty of the State, are matters of local law. Barney v. Keokuk, 94 U.S. 324, 338 [24 L.Ed. 224]; Shively v. Bowlby, supra [152 U.S. 1], [at] p. 40 [14 S.Ct. 548, 38 L.Ed. 331]; Hardin v. Jordan, 140 U.S. 371, 382 [11 S.Ct. 808, 35 L.Ed. 428]; Port of Seattle v. Oregon & Washington R. Co. 255 U.S. 56, 63 [41 S.Ct. 237, 65 L.Ed. 500]." 296 U.S. at page 22, 56 S.Ct. at page 29.

No question of accretions was involved in Borax, the problem being the ascertainment of the boundary between the upland and tideland as it existed at the time the company received its patent. But the principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the

upland. *If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such a title, "involves the ascertainment of the essential basis of a right asserted under federal law."* (294 F.2d at 832). (Emphasis added).

The last three sentences quoted above were in direct and absolute conflict with all of the prior decisions of this Court. It has been shown that this Court had repeatedly declared and affirmed that federal patents do not carry any "attributes" or ownership rights in state-owned tidelands and shorelands—and that if any such riparian rights are to be recognized, they are to be defined solely in accordance with state law. It will be recalled, for example, that *McGilvra v. Ross*, 215 U.S. 70 (1909), held there was no federal question and thus no federal-question jurisdiction, when the dispute concerned lands situated below the high water mark at statehood, because it had been clearly held that federal patents carried no rights in such lands; and in *Blackburn v. Portland Gold Mining Company*, 175 U.S. 571 (1900), this Court said that it had "frequently been vainly" asked to find a federal question when one of the parties to the dispute derived his title directly under an act of Congress. *Joy v. City of St. Louis*, 201 U.S. 332 (1906), clearly held that accretions were solely matters of local law; and *United States v. Holt State Bank*, 270 U.S. 49 (1926), emphatically held that relictions were solely matters of local law. Numerous other decisions of this Court to the same effect have already been discussed above, and the circuit court cited and purported to distinguish some of them (294 F.2d 832-34). The distinctions therein offered are superficial, unrealistic, and totally inaccurate. But this Court denied certiorari (369 U.S. 815 (1962)). Charitably stated, the circuit court's opinion is based solely on a grievous misconstruction of the *Borax* case.

D. *The Hughes v. Washington Decision in 1967*

This Court largely followed the circuit court's opinion in *U.S. v. Washington* when, in 1967, it decided *Hughes v. Washington*, 389 U.S. 290 (1967). The conflict was over accretions which had formed on the beach of the Pacific Ocean. The State of Washington claimed ownership under state law; and Mrs. Hughes, as a successor in interest to a federal patentee, claimed under federal law as announced in the circuit court's opinion in *U.S. v. Washington*. The Court accepted the circuit court's mistaken view of *Borax*, and, as a result, said:

> We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood is the owner of these accretions (389 U.S. at 291).

In creating a "federal common law" to adjudicate rights to accretions formed on the beach, this Court departed from an unbroken line of cases that had been the controlling law for a century. Typical of this Court's earlier, uniform and consistent pronouncements is the following:

> . . . we are of the opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota. This principle, we think, has been announced and adhered to by this court from its very early days . . . . (*St. Anthony Falls Water Power Company v. St. Paul Water Commissioners*, 168 U.S. 349, 358 (1897)).

Despite the many cases reviewed in Section V.B. of this brief, this Court in *Hughes* indicated that it had decided no prior cases to serve as a precedent to determine whether state or federal law should apply to determine the riparian rights (accretions) of Mrs. Hughes:

> While the issue appears never to have been squarely presented to this Court before, we think the path to decision is *indicated* by our holding in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935). In that case we dealt with the rights of a California property owner who held under a federal patent, and in that instance, unlike the present case, the patent was issued after statehood. We held that
>
> [t]he question as to the extent of this federal grant that is, as to the limit of the land conveyed or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U.S. at 22. (389 U.S. at 292).

The Court did not quote the following sentence in *Borax*:

> Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. (296 U.S. at 22).

Nor did this Court view as significant the fact that the lands in dispute were tidelands at the date of Washington's admission into the Union (so that the State undeniably held title at that time), but since had received deposits by the ocean so as to raise the land above the line of the average high tides. Under a careful reading of *Borax*, it is entirely clear that Washington law would have applied to determine whether, or to what extent, Mrs. Hughes as a riparian owner would be accorded any riparian rights in lands that were tidelands at statehood. But the *Borax* decision has been fully reviewed above, and need not be further argued here.

This Court in *Hughes* also cited *United States v. Oregon*, 295 U.S. 1 (1935), in support of its holding, but that case was not at all in point. It simply held that an Oregon statute could not divest the United States of title to land which had always remained in federal ownership (the bed of a non-navigable lake) and which had been reserved by the United States for a bird refuge (389 U.S. at 292). The Court then cited *United States v. Washington*, which is the Ninth Circuit Court's opinion discussed above. The Court cited no other authority in support of its holding that federal law should govern ownership of the accretions. It failed to note, for example, that *Joy v. City of St. Louis*, 201 U.S. 332 (1906), was totally in point but held the exact opposite. In short, this Court failed to cite any of its

earlier decisions that were in point—except *Borax*, and *Borax* was mis-read as holding the exact opposite from its true holding. And this Court thus indicated that it thought it was following its earlier decisions.

It is easy to see how the misuse of *Borax* by the Ninth Circuit laid the foundation for this Court's decision in *Hughes*. The State of Washington, which lost the *Hughes* case, did not explain the actual holding of *Borax* when it filed its brief in *Hughes*. In fact, the State virtually conceded that *Borax* controlled, thus accepting the erroneous view of *Borax* which was adopted by the circuit court. The Supreme Court noted as much:

> Recognizing the difficulty of distinguishing *Borax*, respondent urges to us to reconsider it. *Borax* itself, as well as *United States v. Oregon*, *supra*, and many other cases makes it clear that a dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule. (389 U.S. at 292-93).

Of course, *Borax* is not only easy to *distinguish* from *Hughes*, but in point of plain fact it need not be "distinguished" at all, since it doesn't even come close to Hughes—it held the exact opposite. And there was no "dispute over title to lands owned by the Federal Government," as the Court indicated. Federal law applies when *title* to the lands *in dispute* never passed from Federal Government, and are still *owned by the Federal Government*. But in fact the Federal Government had *parted with title* to the tidelands upon Washington's admission into the Union, and the question was

whether state-owned tidelands had been converted into private riparian ownership by the common law principle of accretion. Thus, *as the Court correctly noted, there was no prior Supreme Court decision which held that federal law should answer that question.* But there were many uncited cases to the contrary. The Court said that *Borax* "indicated" the "path to decision" in *Hughes*. It is respectfully submitted that *Borax* contained no such indication; and that there were dozens of other decisions of the Supreme Court which clearly held that state law should govern the question in *Hughes*.

It might be noted that Mr. Justice Stewart concurred in the *result* of *Hughes*, not because he believed that federal decisional law applied to determine ownership of accretions, but because he thought that the State of Washington had changed the state law relating to accretions—and had applied the change retroactively to divest Mrs. Hughes of relictions which she had earlier owned under state law. This, concluded Justice Stewart, was a denial of constitutional due process. And that was the essential basis for his concurrence. With respect to the source of law question, Justice Stewart aptly observed:

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the

> United States somehow immune from the changing impact of these rules. [Citations omitted]. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. (389 U.S. at 295).

Justice Stewart's concurring opinion was sound.

As a final note on the source of law aspect of *Hughes*, it is interesting to observe that when the Court searched to find cases which explained the substance of the "federal law" of accretion, it found only three to discuss. And those cases are, at best, dubious authority for a federal common law of accretion. Except for the Ninth Circuit's erroneous opinion in *United States v. Washington*, no case had purported to create federal rules of property law. The absence of such cases is explained, of course, by the fact that accretion and reliction claims had always been held to be subject to state rules of property law.

IX. *THE SECOND DEPARTURE: BONELLI v. ARIZONA IN 1973*

In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), this Court applied federal decisional law to determine that certain lands adjacent to the Colorado River, and formerly a part of the state-owned bed of the River, became the property of the private upland owner under the doctrine of accretion when the River

was re-channeled so that the water level was permanently below the disputed tract.

In deciding to apply federal decisional law, the Court employed a more sophisticated rationale than that utilized in *Hughes*. In *Hughes*, it will be recalled, the primary justification for applying federal law was that Mrs. Hughes' predecessor-in-interest had acquired title by patent from the United States, and it was said that such federal title carried with it certain riparian attributes, including the right to future accretions. Without disowning *Hughes*, the Court in *Bonelli* elected to redefine the nature and measure of the title which the States receive to the beds of their navigable waters at statehood.

In so doing, it was decided that the States receive a title that is "defeasible" by the doctrine of accretion (and, presumably, by the doctrine of reliction). Pertinent extracts from the opinion will illustrate the rationale of the Court. It was first recognized that in times past state rules of property law controlled ownership questions relating to the beds of navigable waters and adjacent lands, and the Court said that it still adhered to that view, but that the true issue was the nature of the original title received by the State:

> Having concluded that title to the subject land was thus vested in the State as a matter of settled federal law, the state courts determined that local law controlled whether petitioner, as a riparian owner had any interest in the land thereafter. As the Court said in *Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918): "[I]t is for the States to establish for themselves such rules of

property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them . . . ."

We continue to adhere to the principle that it is left to the States to determine the rights of riparian owners in the beds of navigable streams which under federal law, belong to the State. But this doctrine does not require that state law govern the instant controversy. The issue before us is not what rights the State has accorded private owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act—whether the State retains title to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters. (414 U.S. at 319-20).

The Court then cited *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), in support of the last sentence quoted above. As has been seen, however, *Borax* is no authority for a judicial re-definition of states' rights under the concept of constitutional equal footing. The Court then attempted to distinguish *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Barney v. Keokuk*, 94 U.S. 324, 338 (1877); and *Scott v. Lattig*, 227 U.S. 229 (1913). The rationale for distinguishing these cases was that, while they stood for the proposition that state law controlled the nature and extent of riparian rights, the Court was confronted with quite a different question, *i.e.*, the nature and extent of the original state title:

> The present case, however, does not involve a question of the disposition of lands, the title to which is vested in the State as a matter of settled federal law. The very question to be decided is the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine and the Submerged Lands Act. In this case, the question of title as between the State and a private landowner necessarily depends on a construction of a "right asserted under federal law." (*414 U.S. at 320-21*).

Thus, the "right asserted under federal law" was not any attribute of Bonelli's title as derived through a federal grant or patent, but was in fact the State's title acquired at statehood under the equal footing doctrine. Even though Arizona's title was unquestioned to the extent that the disputed tract had been a part of the riverbed, this Court perceived a federal question because under Arizona law the state title acquired under the equal footing doctrine could not be divested by the common law doctrine of accretion or reliction.

In other words, this Court said, in substance and effect, that Arizona was claiming continued ownership on the theory that its title was not defeasible, and that, it was said, begged the question because the very issue was whether the state's title was defeasible—and the answer to that question was dependent upon a construction of the meaning and effect of the equal footing doctrine. Thus, Arizona was asserting a right "under federal law" that required interpretation by the Court.

The Court then concluded that States receive only a defeasible title to the original beds and shores of navigable waters located above ordinary high water marks and that Arizona's title to the tract in question was di-

vested by the federal common law of accretion. The Court justified this result, in large part, on the fact that the disputed tract was high and dry, and no longer enjoyed any meaningful relationship to the River. Thus, concluded the Court, the important public purposes associated with the public trust over navigable waters was no longer present, and there were no public interest factors in favor of sustaining ownership in the State. (See 414 U.S. at 321 *et seq.*). There was no suggestion, however, that the bed of the Colorado River within the ordinary high water mark was defeasible.

X. *CONCLUSION*

It has been seen that this Court and the Congress have always been consistent in recognizing and confirming state ownership of the beds and shorelands of inland navigable waters. Even the recent decisions of this Court in ***Hughes*** and ***Bonelli***, the wisdom of which is questioned in this brief, steadfastly confirmed such state ownership. Those decisions simply held that the land there involved was *no longer a part of the beds or shorelands* of the navigable waters under scrutiny, and those cases are no precedent for fashioning federal decisional law to resolve property disputes to submerged lands or exposed shores located within the ordinary high water mark of inland navigable waters or the line of average high tides on tidal waters.

However, this brief is critical of those cases because they devised rules of federal common law to resolve riparian property disputes—whereas prior to 1967

this Court had always held that state law controlled such disputes. It is believed that the case now before the Court is only one of hundreds of cases that will prove to be the legacy of the ***Hughes*** and ***Bonelli*** decisions, and that a federal common law of riparian rights will have to be developed in great detail if this Court continues to adhere to those decisions. Those decisions are not only unsound as a matter of law, but they threaten to burden the federal courts with a never-ending stream of property disputes properly within the province of the respective States.

If this Court had established a doctrine of "defeasible title" at an early date, before property rights vested in the beds of navigable waters and adjacent uplands, then everyone would have understood the nature, basis and measure of their rights. But the Court did not do that. From the beginning of the Union until the *Hughes* decision in 1967, the decisions of this Court were clear to the effect that the States obtained complete title to the beds of their navigable waters and that state law would determine whether, and to what extent, riparian rights would be recognized. How, for example, can *Hughes* and *Bonelli* possibly be reconciled with *Joy v. City of St. Louis*, 201 U.S. 332 (1906), or any number of similar cases to the same effect, as discussed above.

In 1967 the *Hughes* decision displaced state law, *for the first time*, in those cases where one of the claimants could trace his title back to an original federal grant. Then, in 1973, *Bonelli* found a more pervasive means of displacing state law by declaring, *for the first*

time, that Arizona's title under the equal footing doctrine was defeasible. Thus, property rights that vested under state law prior to 1967, or prior to 1973, might be divested without compensation under the rationale of either the *Hughes* or *Bonelli* decisions.

Assume that the facts in *Hughes* and *Bonelli* had been different. Assume that Washington and Arizona, by legislative enactments and judicial decisions, had always recognized riparian rights in general, and accretion rights in particular. Then, assume that the Supreme Courts of thos tates simply ignored their earlier decisions and declared that no feature of riparian rights were or ever had been recognized in such States, thus divesting Mrs. Hughes and the Bonelli Cattle Company of accretion rights that they clearly would have owned under the prior state law.

Under these assumed facts, would this Court have permitted such a taking of private property rights without just compensation in violation of the Fourteenth Amendment to the United States Constitution? Surely it would not!

But why would such *hypothetical* conduct on the part of the Washington and Arizona Supreme Courts be any different than the *actual* effect of this Court's decisions in *Hughes* and *Bonelli*? There would be no difference.

This Court can, of course, dispose of the present case by deciding merely that federal law cannot be applied to resolve disputes to lands located below the or-

dinary high mark or the line of average high tides. With that rationale, it would be easy to distinguish *Hughes* and *Bonelli*, since they dealt only with lands that were determined to be, under federal decisional law, located above such boundaries. But it is respectfully submitted that such a course of action would be too cautious, and would leave intact the very uncertainty, confusion and doubt that has spawned the present litigation. More than half of the States of the Union are now before the Court in this action, urging the Court to return to its earlier precedents under which local rules of property law governed all local property disputes. If this Court were to act now to overrule *Hughes* and *Bonelli*, such action would be much more modest than that earlier taken by this Court in *Erie* to overrule the entire *Swift* doctrine, because there the Court could have simply held that there was to be no federal common law of torts, without revoking the federal common law governing commercial transactions as developed under the *Swift* doctrine. And the benefits to be realized from the action now proposed would seem to be much greater than those derived from *Erie*.

Hughes and *Bonelli* are bad law for many reasons. Eighteen of those reasons are summarized in Section II of this brief, *supra*, and need not be restated in this Conclusion. Utah and New Mexico respectfully request the Court to overrule *Hughes* and *Bonelli* and to declare, as it did in 1894 (and at all times prior to 1967), that:

> . . . upon the principles recognized and affirmed by a uniform series of recent decisions of this

court . . . the law of Oregon governs the case. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Vernon B. Romney, Attorney General of, and Counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing *amici curiae* brief of the State of Utah and the State of New Mexico were served on all parties and on *amici curiae* in this case by mailing the same, air mail postage prepaid, to their attorneys of record as set forth below, this 7th day of April, 1976, all in accordance with the Rules of this Court.

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